

VOL. XV

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the

Honorable William M. Skretny, U.S.

Courthouse, 2 Niagara Circle, Buffalo,

New York on March 20, 2013.

APPEARANCES:

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ROCKY PIAGGIONE, Senior Counsel,
U.S. Department of Justice,
Appearing for the United States.

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JEANNE M. GRASSO, ESQ.,
ARIEL S. GLASNER, ESQ.,
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal
Sheila Henderson, Paralegal

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1 (Jury not present in the courtroom.)

2 THE COURT: The attorneys and parties are
3 back present on Tonawanda Coke and Mark Kamholz. I
4 do have a decision to render with respect to the
5 Rule 29 motion. I'll do that now. And then I know
6 the government filed something on the expert
7 witness. I haven't quite finished reviewing that.
8 And I don't know if there's anything that the
9 defense wants to add. I don't have anything from
10 the government on your expert witness.

11 Did we get --

12 THE CLERK: It was filed late.

13 THE COURT: Our computers were down, so we
14 just got them up and running.

15 MR. LINSIN: We filed something yesterday
16 afternoon, your Honor, in response.

17 THE COURT: Okay. Well, let's begin this
18 way. And this follows the moving for judgment of
19 acquittal that was made on Monday. And as far as
20 Rule 29 is concerned, that rule provides, in
21 pertinent part, that upon a defendant's motion a
22 court must enter a judgment of acquittal of any
23 offense for which the evidence is insufficient to
24 sustain a conviction. That's Federal criminal --
25 Rule of Criminal Procedure 29(a).

1 The Second Circuit has held that a defendant
2 challenging the sufficiency of the evidence bears a
3 heavy burden. See United States versus Walker.
4 That's a Second Circuit 1998 case. [42 F.3d 103,
5 112]

6 If it's okay with the attorneys, I won't read
7 the full cites, but I'll have Michelle put the full
8 cites into the record. Mr. Linsin, that works?

9 MR. LINSIN: That's fine.

10 THE COURT: Mr. Personius?

11 MR. PERSONIUS: Yes, Judge.

12 THE COURT: Gentlemen?

13 MR. MANGO: Absolutely, your Honor.

14 THE COURT: A district court may enter a
15 judgment of acquittal on the grounds of
16 insufficient evidence only if, quote, after viewing
17 the evidence in the light most favorable to the
18 prosecution and drawing all reasonable inferences
19 in the government's favor, it concludes no rational
20 trier of fact could have found the defendant guilty
21 beyond a reasonable doubt. United States versus
22 Reyes. That's a Second Circuit case from 2002.
23 [302 F.3d 48, 52]

24 Now, here we have 19 separate counts. We're
25 going to talk about Counts 1 through 15 first

1 because they charge defendants with violating the
2 Clean Air Act, specifically 42 U.S.C. Section
3 7413(c)(1).

4 Counts 1 through 5 allege that defendants
5 operated Tonawanda Coke Corporation in violation of
6 its Title V permit by emitting coke oven gas from a
7 pressure relief valve in the by-products
8 department. Counts 6 through 10 allege that
9 defendants violated Tonawanda Coke's Title V permit
10 by operating the western quench tower, tower one,
11 without a baffle system.

12 Counts 11 through 15 allege that defendants
13 violated Tonawanda Coke's Title V permit by
14 operating the eastern quench tower, tower two,
15 without a baffle system.

16 To satisfy its burden on the Clean Air Act
17 counts, 1 through 15, the government must establish
18 beyond a reasonable doubt each of the following
19 elements of the crime: First, that the defendant
20 was an owner or operator of a stationary source of
21 air pollutants;

22 Second, that the stationary source of air
23 pollutants was subject to the Title V operating
24 permits program;

25 Third, that during the time periods alleged in

1 the indictment, the defendant operated or caused to
2 be operated an emission source in violation of a
3 Title V operating permit requirement;

4 And fourth, that the defendant acted knowingly.

5 Defendants argue that the government has not
6 presented sufficient evidence on each of these
7 elements from which a rational jury could find the
8 defendants guilty.

9 Excuse me just one second, please.

10 Okay. As to Counts 1 through 5, defendants
11 seek judgment of acquittal on those counts on the
12 basis that the pressure relief valve or bleeder
13 valve is an emission point, not an emission source.
14 Each of these counts charges that defendants
15 violated Tonawanda Coke's Title V permit by
16 emitting coke oven gas through the pressure relief
17 valve, an unpermitted source. Defendants argue
18 that based on the testimony at trial, no reasonable
19 juror could find that the pressure relief valve is
20 an emission source.

21 In my view, however, the evidence presented at
22 trial is sufficient to overcome defendants' Rule 29
23 motion. The government's expert Al Carlacci
24 testified that the terms "emission source" and
25 "point" were synonymous, and he later testified

1 directly that operating the pressure relief valve
2 violated the Title V permit. From that testimony
3 it is a fair inference that Carlacci viewed the
4 pressure relief valve as an emission source.

5 Another of the government's experts, Larry Sitzman,
6 offered consistent testimony.

7 Moreover, the definition of "emission source"
8 under 6 NYCRR Section 200.1(f) is any, quote,
9 apparatus, contrivance, or machine capable of
10 causing emission of any air contaminant to the
11 outdoor atmosphere, close quote. The pressure
12 relief valve meets this definition.

13 Finally, I agree with the government's argument
14 that whether the pressure relief valve meets the
15 definition of an emission source is a question of
16 fact that must be resolved by the jury.

17 For these reasons, defendants' motion is denied
18 as to Counts 1 through 5.

19 Counts through 6 through 10. Defendants seek
20 judgment of acquittal on those counts as well on
21 the basis that the government failed to allege that
22 the defendants violated the baffle exemption
23 granted in 1984 by using the western quench tower
24 greater than 10 percent of the time. They also
25 argue that the government failed to present

1 evidence that the baffle exemption granted before
2 issuance of the Title V permit ever ceased to be
3 effective.

4 The exemption letter sent to Tonawanda Coke
5 states that the exemption is conditioned on the
6 prohibitive cost of installing baffles, and that
7 the western quench tower was used less than
8 10 percent of the time. If either of these
9 conditions changed, the letter states that a baffle
10 system may then be required.

11 In my view, dismissal of these counts is not
12 warranted. The government has charged defendants
13 with violating condition 96 of Tonawanda Coke's
14 Title V permit. Both Carlacci and Sitzman
15 testified that use of the western quench tower
16 greater than 10 percent of the time constitutes a
17 violation of condition 96. Thus, there is evidence
18 in the record that would support the jury's
19 verdict.

20 Moreover, I find no support for defendants'
21 argument that the government needed to charge the
22 existence of the exemption in the indictment, an
23 argument for which no legal authority is cited.
24 The existence of an exemption is not an element of
25 the offense. Additionally, I find no prejudice to

1 defendants by way of the government's presentation
2 of the evidence concerning the exemption, as they
3 have been on sufficient notice of government's
4 theory.

5 Finally, viewing the evidence in the
6 government's favor, I find a fair reading of the
7 1984 exemption letter to be the impetus -- to be
8 that, the impetus was on Tonawanda Coke to notify
9 the New York DEC if any conditions of the exemption
10 were no longer being met, notably increased use of
11 the quench tower -- notably, the increased use of
12 the western quench tower. Such a reading is
13 consistent with the self-reporting nature of the
14 statutory scheme and the realities of enforcing the
15 environmental laws. It is unreasonable to expect
16 that New York DEC could effectively monitor the
17 conditions under which the permit was granted and
18 that Tonawanda Coke had no obligation in this
19 regard.

20 Accordingly, defendants' motion for judgment of
21 acquittal on Count 6 through 10 is denied.

22 Counts 11 through 15. Again, the defendants
23 move for judgment of acquittal on those counts on
24 the general basis that the government has not
25 offered sufficient proof. Defendants have not,

1 however, identified any deficiencies in the
2 government's proof, and I find that the government
3 has, in fact, offered sufficient evidence from
4 which the jury could find guilt on these counts.
5 Defendants' motion is therefore denied.

6 Count 16 charges the defendants with
7 obstructing justice in violation of 18 U.S.C.
8 Section 1505 during an EPA inspection by
9 instructing an employee to conceal that a pressure
10 relief valve in the by-products department emitted
11 coke oven gas during normal operations.

12 To satisfy its burden on Count 16, the
13 government must establish beyond a reasonable doubt
14 each of the following elements of the crime:
15 First, that on or about the date set forth in the
16 indictment, a proceeding was pending before an
17 agency of the United States;

18 Second, that the defendants knew that a
19 proceeding was pending before an agency of the
20 United States;

21 Third, that the defendants corruptly endeavored
22 to influence, obstruct, or impede the due and
23 proper administration of the law under which the
24 proceeding was being conducted.

25 Defendants argue that the government has not

1 presented sufficient evidence on each of these
2 elements from which a rational jury could find the
3 defendants guilty. Defendants argue that they are
4 entitled to a judgment of acquittal because there
5 is insufficient proof that a proceeding was pending
6 on the date that Defendant Kamholz instructed Pat
7 Cahill to adjust the pressure relief valve during
8 the EPA inspection. The proceeding at issue is the
9 EPA inspection which began on April 14th, 2009.

10 The indictment charges that from April 14th,
11 2009, to April 21st, 2009, defendants obstructed
12 justice. The testimony at trial was that Mark
13 Kamholz gave this direction to Pat Cahill before
14 April 14th, 2009. There is also evidence that Mark
15 Kamholz received a letter on April 8th, 2009,
16 advising him of the EPA's investigation and
17 inspection. This letter directed Kamholz to begin
18 collecting records, which he endeavored to do.
19 Kamholz's directive to Pat Cahill came after this
20 letter, but before the actual inspection.

21 The issue then is when the proceeding became
22 pending in pretrial particularization. The
23 government identified the proceeding as the joint
24 inspection that was conducted from April 14th
25 through 21, 2009. In my view, the proceeding

1 became pending on April 8th, 2009, when Defendant
2 Kamholz received the EPA's letter directing him to
3 gather documents and prepare for an inspection.

4 Defendants rely on United States versus Smith
5 for the proposition that an imminent or
6 anticipatory theory of a pending proceeding is
7 insufficient under Section 1505. Smith, however,
8 is distinguishable because there is nothing at all
9 pending in Smith. At best, Smith simply believed
10 that an investigation was imminent. Thus, Smith is
11 not instructive, because it was clear that no
12 proceeding was pending.

13 Here I find that Kamholz's receipt of the
14 letter advising him of the upcoming inspection and
15 his need to gather documents in preparation
16 therefore is when the inspection became pending for
17 purposes of Section 1505. A contrary conclusion
18 would be counter to the intent of the statute, as
19 it would allow a party on notice of a proceeding to
20 obstruct that proceeding right up until the time it
21 began.

22 Under defendants' theory in this case, for
23 example, Kamholz could have obstructed the document
24 gathering phase of the inspection with impunity, so
25 long as he stopped before the inspectors set foot

1 on Tonawanda Coke property to begin the physical
2 inspection. Such a result is contrary to the
3 intent of the statute, in my view.

4 Defendants' motion for judgment of acquittal on
5 Count 16 is therefore denied.

6 Counts 17 through 19 charge defendants with
7 violating the Resource Conservation and Recovery
8 Act, RCRA, specifically, 42 U.S.C. Section
9 6928(d)(2)(A).

10 Count 17 charges defendants with storing a
11 waste without a permit as required by RCRA.

12 Counts 18 and 19 charge defendants with disposing a
13 waste without a permit as required by RCRA.

14 In order to prove the defendants guilty of
15 violating RCRA as charged in Counts 17, 18, and 19,
16 the government must establish beyond a reasonable
17 doubt each of the following elements of the crime
18 as to each defendant: First, for Count 17, that
19 the defendant knowingly stored or caused others to
20 store a waste on or about the date set forth in the
21 indictment, and for Counts 18 and 19, that the
22 defendant knowingly disposed of or caused others to
23 dispose of a waste on or about the date set forth
24 in the indictment;

25 Second, that the waste was hazardous as defined

1 by the Resource Conservation and Recovery Act;

2 Third, that the defendant knew that the
3 hazardous waste had the potential to harm others or
4 the environment, in other words, knew that the
5 waste was not a harmless substance like
6 uncontaminated water;

7 And fourth, that the defendant did not have a
8 permit to store, Count 17, or dispose of, Counts 18
9 and 19, the hazardous waste.

10 It appears that defendants move for judgment of
11 acquittal on Counts 17 through 19 on the general
12 basis that the government has not offered
13 sufficient proof on each count. Defendants have
14 not, however, identified any deficiencies in the
15 government's proof, and I find that the government
16 has, in fact, offered at least sufficient evidence
17 from which the jury could find guilt on these
18 counts.

19 Defendant's motion is therefore denied. That
20 will be my ruling.

21 Okay. Is the defense ready with its case?

22 MR. PERSONIUS: Yes, your Honor.

23 MR. LINSIN: We are, your Honor. It would
24 be helpful with respect to how we're going to
25 proceed if the Court is prepared to address the

1 motion to exclude testimony of Miss Williams. We
2 do anticipate her to be a witness here today. I
3 mean, not our first witness, but perhaps if the
4 Court has not had a chance to review our response
5 we can defer it, but --

6 THE COURT: You know, let me take a look
7 at the response. You know, obviously I looked at
8 the government's submission. Do you need that
9 decision before --

10 MR. LINSIN: Not before our first witness.

11 THE COURT: Because based on what I saw in
12 the government's paper, I expect that I know how
13 I'm going to rule, but I do want to take a look at
14 it.

15 MR. LINSIN: Of course.

16 THE COURT: All right. Okay. How about
17 if we take 15 minutes, if you don't mind, and I'll
18 have a chance to do a couple of things, and we'll
19 get ready to get started.

20 Chris, if you tell the jury it will be about 15
21 more minutes.

22 COURT SECURITY OFFICER: Sure.

23 MR. LINSIN: Thank you, your Honor.

24 (Short recess was taken.)

25 (Jury not present in the courtroom.)

1 MR. PERSONIUS: Judge, what's going on is
2 the first witness we're going call is Gary Foersch,
3 F-O-E-R-S-C-H. I was looking at my notebook of
4 prior statements, and I had a document. I realized
5 it didn't have a sticker on it, so I gave it to
6 Aaron to see if he had it, and he has it here. We
7 need to have a few copies of it made. I didn't
8 realize until about three minutes ago.

9 THE COURT: Okay.

10 MR. MANGO: I was going to have the agent
11 go downstairs and make a copy. Miss Labuzzetta has
12 graciously agreed to make some copies.

13 THE COURT: All right. Terrific. That
14 means we can get started, but what I thought I'd do
15 first is just let you know that I've had a chance
16 to review the government's motion to exclude Marcia
17 Williams's testimony, or in the alternative to hold
18 a Daubert hearing. And then I did look at the
19 defendants' submission, which I had not seen until
20 just a short time ago.

21 And I'm going to deny the government's motion,
22 and also deny a Daubert hearing. I find that
23 there's no basis for a Daubert hearing based on the
24 arguments of the government -- you know, the way I
25 look at this is there is an acknowledgment from

1 both sides that you're aware of what my earlier
2 pretrial rulings are with respect to testimony
3 concerning the legal conclusions and the like.

4 You know, I -- and the defendants argue and
5 represent that they fully intend to abide by those
6 rulings. The fact that the submission was not
7 adjusted for the pretrial rulings in light of the
8 representations of the defendants I find does not
9 form a basis to support granting the government's
10 motion. And, you know, I think the government's
11 argument that it's a waste of time, frankly, only
12 time will tell.

13 So, on that basis, the government's motion,
14 both in the primary request to exclude or to hold a
15 Daubert hearing is denied.

16 Okay. So that, I think, wraps up all the loose
17 ends, right? And if we can bring the jury in now
18 please, Chris.

19 COURT SECURITY OFFICER: Yes, sir.

20 (Jury seated.)

21 THE COURT: Good morning. How are you
22 doing, okay? Sorry for the delay. My fault for
23 the most part, and we had some business that we had
24 to resolve on this case. So we're ready to go.
25 Have a seat, and I'll tell you what to look forward

1 to at this point in time. Hope you enjoyed your
2 day off. And, you know, I can tell you're all
3 ready, rested, and eager to begin.

4 And, you know, I will reiterate how important
5 this case is, as you know, to both sides. And, you
6 know, you are a key to the resolve of this case,
7 and the law requires that you resolve the fact
8 issues unanimously as a jury. You are the judges
9 of the facts. And you also know, and I've said
10 this how many times already, I don't like to even
11 think about the count, but that burden rests with
12 the government to convince you beyond a reasonable
13 doubt.

14 No burden on the defense, each of the
15 defendants. They don't have to put on a case, but
16 just so you know, it is their intention to do that
17 now. But the burden doesn't change and the
18 presumption doesn't leave the defendants because
19 they're putting on a case. They have a right.
20 They've entered pleas of not guilty to each of the
21 19 counts, and so if they choose, not only to
22 question the government's witnesses, but to put on
23 their own evidence, that's of their volition. They
24 can do that. And you assess their witnesses just
25 as you would the defense -- the government's

1 witnesses in this particular case.

2 And whether they put on fewer or more witnesses
3 than the government, that's not really anything
4 that is significant. You are to view all of the
5 evidence as a totality. You assess their witnesses
6 just as you did the government's in terms of
7 determining credibility, believability of those
8 witnesses, and, you know, once you do that, then
9 you will be permitted to draw whatever reasonable
10 inferences are fair from the evidence introduced in
11 arriving at your full assessment of all of the
12 evidence, and whether all of that evidence does
13 satisfy the government's proof beyond a reasonable
14 doubt.

15 So with that, I guess the defense is ready with
16 it's first witness, is that correct?

17 MR. PERSONIUS: Yes, sir.

18 THE COURT: Mr. Personius, if you will,
19 please.

20 MR. PERSONIUS: Yes, your Honor. The
21 defense calls Gary Foersch.

22 THE COURT: If you stay right there and
23 face the jury, I'll have you sworn in.

24 Miss Labuzzetta, if you would, please.

25 G A R Y F O E R S C H, having been duly sworn as a

1 witness, testified as follows:

2 THE COURT: Sometimes I wonder if
3 Miss Labuzzetta is going to be able to bring
4 herself to a full stop before she administers the
5 oath. I would not like to be the witness if she
6 could not.

7 But if you would have a seat, please. And
8 we'll have you face the jury. And some very
9 preliminary instructions, please. If the questions
10 that will be asked to you, if you do not understand
11 the question, ask that it be repeated. Try to
12 answer the question succinctly. Don't volunteer
13 information. That's usually when things get
14 complicated. It's really up to the lawyers to draw
15 the information from you, so don't volunteer. If
16 you can answer a question yes or no, please try to
17 do that as best you can.

18 And if there's an objection, wait until I rule
19 on the objection, and then I will give you
20 instructions on whether, for example, to start the
21 answer again, complete the answer, wait for another
22 question, et cetera. Do you understand?

23 THE WITNESS: Yes, I do.

24 THE COURT: All right. You have to speak
25 in a conversational tone only. The microphone's

1 friendly so it should pick you up. You don't have
2 to be right on top of it. I think where you're
3 positioned now is good.

4 Please state your full name, spell your last
5 name, please.

6 THE WITNESS: Gary Foersch, F-O-E-R-S-C-H.

7 THE COURT: Okay, thank you.

8 Your witness, Mr. Personius.

9 MR. PERSONIUS: Thank you, your Honor.

10 DIRECT EXAMINATION BY MR. PERSONIUS:

11 Q. Good morning, Mr. Foersch.

12 A. Good morning.

13 Q. I'm Rod Personius. As you know, I represent
14 Mark Kamholz, who's at the back table. And it's
15 true that you've been good enough to meet with me
16 on several occasions to talk about your
17 recollection of the events that you're going to
18 testify about here today, is that correct?

19 A. Yes.

20 Q. Okay. And you've also made yourself available
21 to the government to talk to them about your
22 recollection, is that true?

23 A. Yes.

24 Q. All right. And is it correct that you're
25 currently retired?

1 A. Yes.

2 Q. Would you please tell the jury about your
3 employment history?

4 A. I basically did 40 years with the New York DEC,
5 primarily in the Division of Air Resources. I
6 worked originally in continuous monitoring where
7 there were a number of samplers set up around the
8 state to monitor the air and compare it to the
9 federal air standards.

10 I then transferred into the stack testing
11 division where I, along with some fellow employees,
12 we'd go right out to a facility and basically stick
13 a probe in the stack, and do sampling, and then
14 that would be -- results of that could be compared
15 to the regulations to see if a company was in
16 compliance.

17 After that, I moved into the permitting and
18 inspection section, where I basically remained for
19 the rest of my career, and in that capacity I would
20 write permits and go out and do facility
21 inspections to see if the facility was living up to
22 the conditions of their permits.

23 Q. Mr. Foersch, when you refer to stack testing,
24 you're talking about waste heat stacks, is that
25 what that was?

1 A. No. It would be any type of -- typically back
2 then it was incinerators, boiler stacks.

3 Q. I see.

4 A. That type of thing.

5 Q. So -- but large chimneys?

6 A. Right.

7 Q. That's what I meant to say. And so that it's
8 clear, your 40 years of employment was all with the
9 Department of Environmental Conservation?

10 A. Correct, and the Division of Air Resources.

11 Q. Okay. That was before DEC?

12 A. No, I'm saying the Division of Air Resources is
13 part of DEC.

14 Q. So you were always --

15 A. I was always in -- I always worked in the air
16 pollution as opposed to water or solid waste, et
17 cetera.

18 Q. Okay. I have to get the question out so that
19 Michelle can get my question and then you give your
20 answer, please.

21 A. Oh, sorry.

22 Q. No, please, it happens.

23 THE COURT: It takes a while to get a
24 rhythm. So just wait for the question then answer,
25 and it moves on rather smoothly. Go ahead, please.

1 Q. We will take our time and we'll do fine.

2 Did you have a particular position that you
3 held with DEC once you started doing the permitting
4 and the inspections? Did you have a title?

5 A. Yes, Principle Environmental Engineering
6 Technician.

7 Q. All right. And are there -- were there other
8 people that you worked with in the DEC office that
9 did the same work that you did, these air
10 inspections?

11 A. Yes.

12 Q. Okay. And there's been some people who have
13 testified in this case. One was Larry Sitzman.
14 Did you work in that section when Mr. Sitzman was
15 there?

16 A. Yes, I did.

17 Q. Okay. And the name has come up, Cheryl
18 Webster. Are you familiar with her?

19 A. Yes.

20 Q. Did you work with her for a period of time?

21 A. Yes.

22 Q. Okay. Someone who hasn't testified but the
23 name has come up is Henry Sandonato. Do you know
24 who he is?

25 A. He was at one time the Regional Air Pollution

1 Control Engineer. He would have been my --

2 basically the boss of the Division of Air at the
3 time.

4 Q. I see. Okay. And for what period of time was
5 Mr. Sandonato the boss of that section?

6 A. Well, I can't give specific dates. I believe
7 he retired or left our office in the early 2000s.

8 Q. All right. And was he replaced by someone --
9 did someone take over that supervisory position?

10 A. Yes.

11 Q. Who was that?

12 A. Larry Sitzman.

13 Q. All right. Did Mr. Sitzman remain in that
14 capacity until you retired?

15 A. Yes.

16 Q. I don't know if you told us, when did you
17 retire?

18 A. In November of 2009.

19 Q. And if my math is correct, does that mean you
20 started in '69?

21 A. In 1969, correct.

22 Q. Okay. Now, as part of your duties with
23 Tonawanda -- or with DEC -- I'm giving away my
24 question -- with DEC as a technician, did you work
25 out at Tonawanda Coke?

1 A. Yes.

2 Q. During what period of time were you assigned to
3 do work with Tonawanda Coke?

4 A. It would have been from the early 1980s right
5 on through my retirement.

6 Q. So for about 30 years?

7 A. About 30 years.

8 Q. All right. And would that include going out to
9 the -- to the site?

10 A. Yes, it would.

11 Q. Would you tell the jury where Tonawanda Coke is
12 located please?

13 A. It's on River Road in Tonawanda.

14 Q. All right. Near the Grand Island Bridge, up in
15 that area?

16 A. Correct.

17 Q. How frequently would you go out to Tonawanda
18 Coke?

19 A. Typically once a year.

20 Q. Could we have -- this is for identification.

21 Lauren, could you please put up for
22 identification Government Exhibit 105.37?

23 The way this works, Mr. Foersch, is you will
24 see that exhibit on that screen that you're looking
25 at. Do you see it says 105.37 on the yellow

1 sticker?

2 A. Yes.

3 Q. Okay. That's how we try to handle exhibits.

4 This is more efficient that way. What you see on
5 the screen, do you recognize what's shown in that
6 exhibit?

7 A. Yes, sir. That appears to be an aerial
8 photograph of Tonawanda Coke.

9 Q. Okay. And based on your 30-or-so-year
10 experience working out at Tonawanda Coke, do you --
11 do you see that as being a fair representation of
12 the different parts of the plant, in other words
13 where the office area is, where the coal fields
14 are, where the by-products area is, where the
15 battery is, is that all shown in that photograph?

16 A. Yes, I believe it's remained pretty much
17 constant over the years.

18 Q. Does the photograph also show River Road and
19 the entrance up to Tonawanda Coke?

20 A. Yes, it does.

21 Q. Okay.

22 MR. PERSONIUS: Your Honor, I offer this
23 exhibit.

24 MR. PIAGGIONE: Your Honor, we have no --
25 government has no objection except to provide the

1 information that this photograph was taken in April
2 of 2009. That was what was stipulated to
3 previously.

4 THE COURT: All right. So stipulated --

5 MR. PERSONIUS: Sure.

6 THE COURT: -- no objection.

7 MR. LINSIN: No objection, your Honor.

8 Thank you.

9 THE COURT: Okay. 105.37 will be
10 received.

11 MR. PERSONIUS: Thank you, Judge.

12 (Government's Exhibit 105.37 was received
13 into evidence.)

14 MR. PERSONIUS: May we publish to the jury
15 please?

16 THE COURT: Yes.

17 BY MR. PERSONIUS:

18 Q. All right. Now the jury can see it, so I'm
19 going to ask you some questions about the picture.
20 Remember I asked you if it showed River Road?

21 A. Yes.

22 Q. Okay. You have the ability by tapping the
23 screen to make either a little red box or an arrow.
24 So if you try by tapping the screen show the jury
25 where River Road is, please.

1 A. All right.

2 Q. You're a square guy, not an arrow.

3 Do you see the entrance off of River Road to
4 Tonawanda Coke?

5 A. Yes.

6 Q. Okay. Would you show the jury where that is
7 again? Do another tap. Very good.

8 And so you come up that roadway, and that takes
9 you into the plant area?

10 A. Yes.

11 Q. All right. There's been some testimony about a
12 gate that you have to go through. Do you see
13 that -- well, first of all, do you remember there
14 is a gate you have to go through?

15 A. Yes.

16 Q. And a guard shack or guard house?

17 A. It wasn't always there. But, yes, in recent
18 years.

19 Q. Okay. Can you show the jury, please, with
20 another tap where that is?

21 A. It's pretty close to where the last one is, but
22 I'll try again.

23 Q. Okay. Now, what's in that location, is that
24 like what you see at a railroad track, a bar that
25 goes up and down?

1 A. Yes, it is.

2 Q. And as you drive in toward the facility, is
3 there another cycloned fence type gate that slides
4 when you enter the facility, do you remember that?

5 A. That I don't remember.

6 Q. Okay. Do you remember where the -- where the
7 guard house is?

8 A. Yes.

9 Q. Okay. Can you show the jury where that is?

10 A. Okay.

11 Q. Now, when you would go to the facility, would
12 you have contact with Mr. Kamholz?

13 A. Yes, I would.

14 Q. Okay. And you mentioned you went there about
15 once a year, that is to Tonawanda Coke?

16 A. Yes.

17 Q. Okay. What was the reason you had that contact
18 with Mr. Kamholz?

19 A. You mean as far as making a yearly inspection?

20 Q. Well, why would it be Mr. Kamholz that you
21 would have the contact with?

22 A. He was the designate -- my designated contact
23 person.

24 Q. And did you know him to be the environmental
25 manager, or whatever his title is, the

1 environmental person for Tonawanda Coke?

2 A. Yes.

3 Q. And would you go to his office from time to
4 time to meet with him?

5 A. Yes.

6 Q. Okay. I'm going take off what you've put on
7 there. And this time can you identify on this
8 exhibit where Mr. Kamholz's office is, please?

9 All right. There's a series of buildings over
10 in the upper left-hand corner of the photograph?

11 A. Right.

12 Q. And that's -- his office is part of that group
13 of buildings?

14 A. Yes.

15 Q. Okay. And now when you would go to do your
16 inspection at Tonawanda Coke and you wanted to see
17 Mr. Kamholz, did you park your car near the guard
18 house and walk around, or how did you get from the
19 guard house to Mr. Kamholz's office?

20 A. Well, couple of different scenarios. One would
21 be prior to the gate being out front, I would have
22 to drive up to the guard house, announce who I was,
23 and ask to see Mr. Kamholz.

24 Q. Okay.

25 A. Sometimes he would come up to the guard house

1 to get me. If I -- they'd ask you do you know
2 where his office is, which I would reply yes. They
3 would say well, you can proceed back to his office
4 then. And I would drive back there.

5 Q. You would drive back there?

6 A. Yes.

7 Q. There is like a road that goes back there?

8 A. Yes.

9 Q. If Mr. Kamholz came to greet you, would he come
10 in a vehicle, or would he walk over to greet you?

11 A. He would drive.

12 Q. All right. Now, when you would go out to
13 Tonawanda Coke, would you from time to time go to
14 the by-products area?

15 A. Yes, I would.

16 Q. All right. Do you see where the by-products
17 area is on the -- on the photograph?

18 A. Yes.

19 Q. Could you do another tap, please, to show the
20 jury?

21 All right. And that's more on the right-hand
22 middle side of the picture?

23 A. Yes.

24 Q. Where you put that, that's where the
25 by-products area is?

1 A. Not in its entirety. There is a little more in
2 another area.

3 Q. Okay. Maybe just to clear that up, where's the
4 rest of by-products please?

5 I see. The second -- the higher of the two red
6 blocks you put on, what's in that area?

7 A. The light oil.

8 Q. I see. We've heard about that. Now, how would
9 you get from Mr. Kamholz's office over to
10 by-products?

11 A. Can I draw a line on this or --

12 Q. Go ahead.

13 A. I would drive my vehicle.

14 Q. You wouldn't walk from his office over there?

15 A. Sometimes we would drive from his office to
16 another parking lot, and then walk into the
17 facility.

18 Q. Okay. Did you ever walk from his office all
19 the way over to by-products?

20 A. No.

21 Q. You would take a vehicle?

22 A. Yes.

23 Q. Okay. Now, when you would do inspections at
24 Tonawanda Coke, is by-products one of the areas
25 that you would look at?

1 A. Yes.

2 Q. All right. Would you also -- part of what you
3 would inspect, would that be the boiler house?

4 A. Yes.

5 Q. Can you show the jury where the boiler house is
6 on there, please?

7 All right. And it looks like there is a tall
8 stack -- at least one tall stack there?

9 A. Yeah, there's actually I believe three. Two
10 tall and a shorter one.

11 Q. All right. And would you also do inspecting at
12 the -- whether it's called the battery or the
13 ovens?

14 A. Yes.

15 Q. Could you please show the jury where that's
16 located on here?

17 Thank you. Now, in addition to talking to
18 Mr. Kamholz at his office, looking at by-products,
19 looking at the boiler house area, and looking at
20 the oven or battery, was there any other parts of
21 the Tonawanda Coke operation that you would
22 inspect?

23 A. On a rare occasion also would maybe take a look
24 at the coal piles as far as fugitive emissions,
25 what we call fugitive emissions would go.

1 Q. For both the benefit of the jury and me, what's
2 a fugitive emission?

3 A. Basically an emission that is vented to the
4 atmosphere that gets there other than going through
5 a stack.

6 So basically if you have a roadway or pile of,
7 in this case, ground up coal, and the wind blows
8 across it, the emissions off of the -- you know,
9 that you would see off of that would be deemed to
10 be fugitive emissions.

11 Q. All right. How frequently would you go out to
12 the coal fields?

13 A. Very infrequent.

14 Q. Meaning -- you're there once a year. Maybe --
15 or how many times total did you go out to the coal
16 fields while inspecting at Tonawanda Coke?

17 A. Three.

18 Q. Three times total?

19 A. Yeah.

20 Q. All right. When you went out there, did you
21 make any observations about what activity was
22 occurring?

23 A. Yes.

24 Q. All right. And what -- what observations
25 generally did you make?

1 A. Well, you would observe truck traffic, and just
2 try to evaluate when the wind was blowing if there
3 was any noticeable amount of dust coming off the
4 piles.

5 Q. Okay. Did you ever -- do you know what coal
6 tar sludge is?

7 A. Yes.

8 Q. If you don't, just say no. Don't say you do if
9 you don't. Do you know what it is?

10 A. It's -- well, I'm going to say no then.

11 Q. Did you ever see front end loaders out in the
12 coal field area?

13 A. Yes.

14 Q. Okay. Did you ever observe what they were
15 doing out there?

16 A. Most of the time just moving -- the coal piles,
17 as I understand it contain -- there's actually many
18 different types of coal.

19 MR. PIAGGIONE: I'm going to object, your
20 Honor. This witness is not someone who's an expert
21 in RCRA, has any background in the mixture of coal.

22 THE COURT: Well, the witness is
23 telling -- his last testimony I'll allow it to go
24 that far. I mean, it doesn't call for any
25 expertise, and you can cross-examine on that. But

1 his understanding is the front loaders were moving
2 coal.

3 MR. PERSONIUS: I think that's what we
4 were getting at.

5 BY MR. PERSONIUS:

6 Q. Let me ask a leading question. Did you see the
7 front end loaders moving coal?

8 A. Yes.

9 Q. Okay. Thank you. We can move on. Can you put
10 your finger again please where the coal fields are,
11 Mr. Foersch?

12 A. I'll put a few. Basically in this area. I got
13 an arrow for some reason.

14 Q. You're getting better. All right. That's
15 great.

16 What is the -- if you know, do you have any
17 idea what the -- what the acreage is for -- that's
18 occupied by Tonawanda Coke is?

19 A. I believe in the 150 acre area. I don't know
20 exactly.

21 Q. All right. And just -- I don't know if we
22 can -- if you can -- and maybe you can't. On this
23 overhead -- well, let's do this. I'm going to take
24 your things off.

25 And, Lauren, if you could, please, could you

1 make that part bigger please, Lauren? Thank you.

2 What I wanted to ask, Mr. Foersch -- and I
3 think this will work -- do you know what a
4 quenching tower or quenching station is?

5 A. Yes.

6 Q. Do you draw a distinction between a tower or a
7 station?

8 A. Not really.

9 Q. Okay. Is it okay to use either term?

10 A. Yes.

11 Q. Okay. Now -- and which do you prefer, tower or
12 station?

13 A. Quench tower I prefer.

14 Q. Are you familiar with the quenching towers at
15 Tonawanda Coke?

16 A. Yes.

17 Q. Okay. Can you look on this exhibit, Government
18 Exhibit 105.37, are you able, again with your
19 finger, to show the jury where the quench towers
20 are located?

21 You've put two red squares on the picture,
22 right?

23 A. Yes.

24 Q. The one at the top of the page, what direction
25 is that, do you know?

1 A. That is to the west side of the plant.

2 Q. Okay. And was that tower sometimes referred to
3 as the west quench tower?

4 A. Yes. Or tower number 1 --

5 Q. Okay.

6 A. -- I believe.

7 Q. All right. And where you put the other square,
8 is that roughly where the other quench tower is?

9 A. Yes.

10 Q. And that would be to the east?

11 A. The east.

12 Q. And did you know that by another designation
13 other than the east quench tower?

14 A. That would be tower number 2.

15 Q. Okay. All right. Thank you very much.

16 Now, do you remember -- and I suppose we can
17 take that down. I think we're done with it,
18 Lauren.

19 Do you remember when the first time was,
20 Mr. Foersch, that you went out to Tonawanda Coke?

21 A. It would -- the very first time would have been
22 when I was with the stack testing unit. And it
23 would have been in the mid to late '70s.

24 Q. Are you familiar with when Tonawanda Coke
25 became Tonawanda Coke?

1 A. Not the exact date, no.

2 Q. Okay. Do you know that it was sometime in the
3 '70s?

4 A. Yes.

5 Q. Were you out at the site before the site was
6 taken over by the Tonawanda Coke?

7 A. I don't recall.

8 Q. Now, you've told us that you would go out to do
9 your inspections at Tonawanda Coke once a year?

10 A. Yes.

11 Q. And what was the reason you went once a year?

12 A. Basically to, you know, at the request of my
13 supervisors to do a visible emissions inspection of
14 the coke oven battery. Tonawanda was considered a
15 major source, and we were required to inspect major
16 sources once per year.

17 Q. We've had this described before, but it's been
18 a while. Could you give the jury a lay definition
19 of what a major source is? Or can't you?

20 A. I'd have to quote some numbers, and I can't --
21 I've kind of forgot them.

22 Q. But is it based on the quantity of emissions,
23 is that what determines it?

24 A. Typically, yes. And in a layman's term, the
25 more emissions you had, or if they were hazardous

1 above certain levels, you were deemed a major
2 source.

3 Q. All right. Now you mentioned to us in terms of
4 these inspections that you would do on a yearly
5 basis that you were sent out there to check out the
6 ovens?

7 A. Yes.

8 Q. Okay. Can you tell the jury a little bit about
9 what you would do, please, when you would go out to
10 Tonawanda Coke?

11 A. Well, basically, we would have to go top-side
12 on the ovens and inspect for the number of leaks
13 that they possibly had on charging holes, off-take
14 piping. We would watch some charging occur. We
15 would look for door leaks on both sides of the
16 battery. And we would observe pushing, and that's
17 pretty much what we did at the battery.

18 Q. Okay. And as you watched the charging and the
19 pushing, was there something you were looking for?

20 A. Depending on if it was a lid or an off-take or
21 a door, there was different allowables as far as
22 how much smoke and how long they could emit smoke
23 from them. And in some cases on pushing we would
24 observe and document the opacity of the smoke.

25 Q. And again, the opacity means what?

1 A. It's basically how much the smoke obscures
2 light. So if you have no smoke present, you have
3 zero percent opacity. And if you have something
4 that's pitch black that you can't see through, then
5 it's considered a hundred percent opacity.

6 Q. To be able -- you would do readings of the
7 smoke?

8 A. Yes.

9 Q. With the naked eye?

10 A. Naked eye, yes.

11 Q. You didn't have any device you used?

12 A. No.

13 Q. Did you have some type of training that you
14 received that enabled you to be able to --

15 A. Yes.

16 Q. -- to qualify to do that?

17 A. Yes, I'm sorry.

18 Q. Would you tell the jury just briefly what that
19 training was?

20 A. Basically on an annual basis, and certain
21 sources required that we be tested bi-annually.
22 Tonawanda Coke was one of them. We would basically
23 go out, and they had a smoke generator which could
24 emit varying opacities from zero to a hundred
25 percent. And it had an optical eye on it that

1 would read the opacity. And we would have to be
2 able to read the opacity, and our results were
3 compared with the optical eye. And you basically
4 had to be able to read within a certain standard.

5 Q. And how frequently did you have -- was that
6 like a test you had to take?

7 A. Yes.

8 Q. How frequently did you have to do that?

9 A. Twice a year.

10 Q. Twice a year. Okay.

11 A. Yes.

12 Q. Now, you mentioned that, as part of your
13 inspections, you would also go to -- I think you
14 said by-products and the boiler area --

15 A. Yes.

16 Q. -- is that true? And every year when you would
17 go out, would you go to the ovens, to the boiler,
18 and to by-products? Did it work that way?

19 A. In the early years it was primarily the ovens
20 and the boiler house. The by-products when I first
21 started did not have permits.

22 Q. Okay. So each year when you went out, as you
23 say, in the early years, then would you go to both
24 the ovens and also to the boiler house?

25 A. Yes. Yes.

1 Q. All right. And then there came a time when you
2 also included the -- the by-products area in your
3 inspections?

4 A. Right.

5 Q. And once that -- we'll get to when that was in
6 a minute. Once that happened, each time you went
7 out would you go to all three areas?

8 A. Not necessarily.

9 Q. All right. We should probably explore that a
10 little bit. How did you decide when you went out
11 to do an inspection where you would spend your
12 time?

13 A. It was primarily devoted to the battery itself,
14 because that's where most of the emissions were
15 coming from at the time.

16 Q. Okay. And did that -- that focus on the
17 battery, was that a decision you made, or was that
18 a decision someone else made for you?

19 A. Typically it was my supervisor would tell me to
20 go out and do a Method 9 as they called it,
21 inspection of the battery.

22 Q. And again, this had to do with taking these
23 opacity --

24 A. Method 9 is a specific method that spells out
25 the requirements for performing a visible emissions

1 inspection.

2 Q. All right. And this focus on the -- if I can
3 call it that, a focus during your inspections on
4 the oven or battery area, did that continue
5 throughout the 30 years that you would go out to
6 Tonawanda Coke?

7 A. Yes.

8 Q. All right. And would there be some times then
9 that you would go out that you wouldn't spend any
10 time, for example, in the boiler area?

11 A. On a rare occasion, yes.

12 Q. All right. And how about the -- once you
13 started inspecting the by-products area, would
14 there be years that you wouldn't check the
15 by-products area at all?

16 A. By that time probably not. It would be most
17 ever time.

18 Q. You would go to by-products?

19 A. Yes.

20 Q. And when was it that part of your inspection
21 duties began to include the by-products area, when
22 did that happen?

23 A. The permitting of the by-products area started
24 in I believe 1984.

25 Q. Okay. I think you had told us you started

1 going out to Tonawanda Coke around 1980 or so?

2 A. Probably in '81.

3 Q. Okay. All right. Thank you. When you would
4 go out and do these annual inspections, was there a
5 period of time that you would spend at the
6 facility? You know -- you know, you don't know.
7 Minutes, hours, each time you went?

8 A. Well, I'd usually allotted pretty much a day
9 for the inspection.

10 Q. So about eight hours?

11 A. No. I'm allowing -- probably about five.

12 Q. Okay. All right.

13 Could we have put up on the screen, please
14 Lauren, this is in evidence, Government
15 Exhibit 19.01.

16 Do you see this Exhibit 19.01 on your screen?

17 A. Yes.

18 Q. I guess let's do this so it's a little easier
19 to read. Could we have that bigger please, Lauren?

20 Okay. It's easier to read, right?

21 A. Yes.

22 Q. Okay. And this is a letter dated March 13 of
23 1981, right?

24 A. Yes.

25 Q. And have you seen -- it's from Mr. Kamholz,

1 right?

2 A. Yes.

3 Q. To a Robert Armbrust, A-R-M-B-R-U-S-T?

4 A. Correct.

5 Q. At Region 9?

6 A. Right.

7 Q. Here in Buffalo?

8 A. Yes.

9 Q. Okay. Who at the time was Robert Armbrust, if
10 you remember?

11 A. He would have been, again, the Regional Air
12 Pollution Control Engineer at the time.

13 Q. Okay. Would that make him the head of the air
14 section?

15 A. Head of the Division of Air, yes.

16 Q. Would that be before Mr. Sandonato took that
17 position?

18 A. Yes, it would.

19 Q. Okay. Have you seen this letter before?

20 A. I think so.

21 Q. You've seen it maybe in the file?

22 A. Yes.

23 Q. I think there's a -- Lauren, if you could
24 please go to page 03.

25 Now page 03 is on -- has a heading on it of

1 Tonawanda Coke Corporation, is that correct?

2 A. Correct.

3 Q. Do you recognize what is shown in this exhibit?

4 A. It's what we would call a basic flow diagram.

5 Q. Do you remember having seen this before?

6 A. I believe I've seen this particular piece of
7 paper, yes.

8 Q. All right. And now, do you know what the
9 reason was for this diagram being submitted to the
10 DEC by Tonawanda Coke?

11 A. If it was submitted in '81?

12 Q. Yes.

13 A. Not exactly. I'm not exactly sure.

14 Q. Would it be fair to describe this as a
15 primitive flow diagram?

16 A. Yes.

17 MR. PIAGGIONE: Objection, your Honor. He
18 already testified he was not aware of what this
19 was.

20 THE COURT: I think you're going to move
21 on from here.

22 MR. PERSONIUS: Yes. Just to get across
23 the point, if it's appropriate, Judge, that this a
24 pretty rudimentary diagram.

25 THE WITNESS: Yes, it is.

1 MR. PERSONIUS: Okay.

2 THE COURT: I'll let it stand. Thank you.

3 MR. PERSONIUS: Thank you, Judge.

4 BY MR. PERSONIUS:

5 Q. Lauren, would you please put defense -- this is
6 for identification, Defense Exhibit MM on the
7 screen?

8 Mr. Foersch, do you see that there's now a
9 document that's Defense Exhibit MM. It's for
10 identification. Do you see that sticker on it?

11 A. Yes.

12 Q. Is this document familiar to you?

13 A. Yes, it is.

14 Q. Okay. And it was actually prepared by you?

15 A. Yes.

16 Q. It relates to Tonawanda Coke?

17 A. Correct.

18 Q. And the date of it, can you read the date?

19 A. May 6th, 1981.

20 Q. Okay. Would this have been at a time when you
21 were doing inspections at Tonawanda Coke?

22 A. Yes.

23 Q. Okay.

24 MR. PERSONIUS: Your Honor, we offer this.

25 MR. PIAGGIONE: No objection, your Honor.

1 THE COURT: Okay. MM -- let's see,
2 Mr. Linsin, no objection?

3 MR. LINSIN: No objection, your Honor.

4 THE COURT: Received, no objection. It
5 may be published.

6 (Defendants' Exhibit MM was received into
7 evidence.)

8 MR. PERSONIUS: Thank you, Judge.

9 BY MR. PERSONIUS:

10 Q. All right. Now, could we make that part
11 bigger, Lauren? Thank you.

12 What we have on the screen is part of this
13 Defendants' Exhibit MM in evidence blown up, is
14 that correct, Mr. Foersch?

15 A. Yes.

16 Q. All right. And it indicates up at the top
17 that -- the first sentence is that on May 5, 1981,
18 a Mr. Stanton and you documented visible emissions
19 at the subject facility?

20 A. Correct.

21 Q. All right. Who was Mr. Stanton?

22 A. He was my supervisor at the time.

23 Q. And can you just tell the jury generally what
24 the purpose of this memo was?

25 A. Basically to determine compliance with our regs

1 at the time.

2 Q. And regs related to?

3 A. The amount of smoke and the opacity of the
4 smoke coming from the oven.

5 Q. From the oven?

6 A. Yes.

7 Q. And would it be fair to describe this as
8 documenting an oven inspection?

9 A. Yes, at the time.

10 Q. That was conducted on May 5 of 1981?

11 A. Yes.

12 Q. Lauren, would you please put Government Exhibit
13 in evidence 19.02 on the screen?

14 We now have Exhibit 19.02 on the screen,
15 Mr. Foersch?

16 A. Yes.

17 Q. Is this -- is this a letter?

18 A. Yes.

19 Q. Okay. Is this familiar to you?

20 A. Yes, it is.

21 Q. All right. Please make that bigger, Lauren.

22 Now, if you recall, this was a Tonawanda Coke
23 letter to Stanley Gubner, G-U-B-N-E-R?

24 A. Gubner.

25 Q. I'm sorry, Gubner. Who was Mr. Gubner?

1 A. He would have been the RAPCE that replaced
2 Robert Armbrust.

3 Q. I see.

4 A. When I say RAPCE, Regional Air Pollution
5 Control Engineer.

6 Q. It went from Armbrust to Gubner --

7 A. To Gubner, Sandonato to Sitzman.

8 Q. Okay. Thank you. Now, this -- in this letter
9 it's dated September 19 of 1983?

10 A. Yes.

11 Q. All right. The first paragraph indicates
12 certain applications, sir, are being forwarded,
13 right?

14 A. Yes.

15 Q. And then the rest of the letter, do you see in
16 the second paragraph, second line there's a
17 reference to QUEN1?

18 A. Yes.

19 Q. And do you remember this letter being sent in?

20 A. No.

21 Q. Do you know that in and around 1983, 1984, DEC
22 granted permission to Tonawanda Coke to operate the
23 number 1 quench tower without baffles?

24 A. No.

25 Q. You're not familiar with that?

1 A. No.

2 Q. Okay. Did you ever -- while you were working
3 for DEC, did you ever have knowledge that Tonawanda
4 Coke had a formal exemption from the DEC from
5 having baffles in quench tower number 1?

6 MR. PIAGGIONE: Objection, your Honor.
7 It's already been asked and answered I believe.

8 THE COURT: It's a different question.
9 Overruled. You may answer.

10 THE WITNESS: Could you repeat the
11 question?

12 BY MR. PERSONIUS:

13 Q. Yes. While you were working at the DEC, did it
14 ever come to your attention that DEC had given
15 Tonawanda Coke an exemption from the baffles
16 requirement for tower number 1?

17 A. Yes, they did.

18 Q. Okay. And do you remember when Tonawanda Coke
19 received that exemption?

20 A. The exemption I'm thinking of was later on,
21 maybe late '80s.

22 Q. All right. This -- this letter, just if you
23 would, just take a minute, please, and read it to
24 yourself. And my question is going to be, after
25 you've taken a look at it, whether it's familiar to

1 you. If it's not, we'll move on. If it is, I want
2 to ask you a few questions.

3 MR. PIAGGIONE: Again, objection, your
4 Honor. He already said he does not recognize this
5 letter. Twice he answered it.

6 MR. PERSONIUS: I'm asking to read it to
7 himself to see if it's familiar to him.

8 THE COURT: I'll permit it.

9 MR. PERSONIUS: Thank you. When you
10 finish this page, let us know, Mr. Foersch, because
11 there is a second page also.

12 THE WITNESS: Okay.

13 BY MR. PERSONIUS:

14 Q. Could we go to the second page, Lauren?

15 Please read he that to yourself also,
16 Mr. Foersch.

17 Are you finished reading it?

18 A. Yes.

19 Q. Having read it, does that help you remember
20 having seen this letter before?

21 A. Not really. I was aware of an exemption but --

22 THE COURT: Let's move on, Mr. Personius.

23 MR. PERSONIUS: We will, Judge.

24 BY MR. PERSONIUS:

25 Q. Would you please, Lauren, put on the screen

1 Government Exhibit 19.17 which is in evidence?

2 Do you see on the screen this exhibit,
3 Mr. Foersch?

4 A. Yes.

5 Q. All right. Please make that part bigger,
6 Lauren.

7 Just take, if you would, a quick look at this
8 letter and let us know if this letter is familiar
9 to you, Mr. Foersch.

10 A. Yes, this one is.

11 Q. This one is?

12 A. Yes.

13 Q. This one is dated March 14 of 1984?

14 A. Yes.

15 Q. You were copied on this letter?

16 A. Yes.

17 Q. All right. And what was the -- if you recall,
18 what was the purpose of this letter?

19 A. As I recall it, it was a request to use quench
20 tower number 1 on a limited basis, because they had
21 to perform maintenance or other work on the quench
22 tower number 2. And they had to keep the process
23 running, and also I believe they had to use it
24 occasionally in the winter to keep it from freezing
25 up.

1 Q. And by "it" you mean quench tower number 1?

2 A. Quench tower number 1.

3 Q. All right. How long did this exemption
4 continue, do you remember?

5 A. I was under the intention -- or impression it
6 continued through my employment.

7 Q. So through --

8 A. Through 2000 -- through November of 2009 when I
9 left, I was under the impression it was still in
10 effect.

11 Q. Okay. You're aware that there came a point in
12 time when Tonawanda Coke was issued a Title V
13 permit?

14 A. Yes.

15 Q. Do you remember when that was?

16 A. It would have been the early 2000s.

17 Q. All right. And are you aware that that Title V
18 permit had reference in it to each of the two
19 Tonawanda Coke quench towers?

20 A. Yes, I am.

21 Q. All right. And do you remember what was
22 provided for in that Title V permit regarding tower
23 number 1?

24 A. Could you be a little more specific?

25 Q. Yes, I can. Did the permit, the Title V

1 permit, with respect to tower number 1, address
2 whether or not baffles were required in that tower?

3 A. Yes, it did.

4 Q. And do you remember what it said?

5 A. It required baffles.

6 Q. Okay. But your understanding was that this
7 exemption took precedence over that condition of
8 the permit?

9 A. Yes, that was my -- yes.

10 Q. Did you ever discuss that understanding that
11 you had with anyone at DEC?

12 A. With DEC you say?

13 Q. Yes.

14 A. In what time period are we talking or --

15 Q. During between -- well, I guess between when
16 the permit became effective and the time you
17 retired.

18 A. No. No.

19 Q. Okay. All right. Now, in this letter --
20 again, this is Government Exhibit 19.17. Can -- I
21 know what we do.

22 Lauren, can you highlight that sentence,
23 please? It starts right there.

24 This sentence that's on the screen right now,
25 it starts with "since the dimensions", do you see

1 that?

2 A. Yes.

3 Q. And it says -- as it continues it says, "The
4 dimensions of the quench tower would require a
5 significant amount of expense for very little
6 reduction in particulate control." It goes on to
7 say the exemption is granted, right?

8 A. Yes.

9 Q. Do you know what that phrase means, "very
10 little reduction in particulate control"?

11 A. Yes.

12 Q. Would you tell the jury what your understanding
13 is as to the intent of that phrase?

14 A. Well, it would obviously be -- you know, quench
15 towers are quite large in cross-sectional area, and
16 to install a number of baffles as was required in
17 our regulation would have obviously cost the firm a
18 certain amount of money. And it was felt that
19 baffle systems are very low in efficiency. In
20 other words, they collect certain sized particles
21 pretty good and then everything else goes right
22 through them. So the department felt that given
23 the cost of the baffle system and the very little
24 difference in emissions that would be made, that it
25 would grant the exemption.

1 Q. Were you part of that discussion that led to
2 this determination that the exemption would be
3 granted?

4 A. No, I was not.

5 Q. You got to wait for me.

6 A. Sorry.

7 Q. It's all right. Could we have the full exhibit
8 again please, Lauren. 19.17. All right. I think
9 that's it. Could we go please, Lauren, to
10 Exhibit -- Government Exhibit in evidence 19.03.

11 We're going to make this bigger because this is
12 hard to see. Do you recognize this --

13 A. Yes.

14 Q. -- exhibit. Just in this size can you tell the
15 jury what it is? We can make it a little bigger if
16 you need to in certain areas.

17 A. That is one of our original, what we call the
18 operating certificates or an Air 100. It's
19 basically the permit that the department issued to
20 a company giving them -- granting them permission
21 to operate a particular emission point or emission
22 source.

23 Q. Okay. Lauren, could you please make that upper
24 part bigger? That helps a lot. Thank you. Okay.

25 Now that it's bigger, can you tell which

1 facility at Tonawanda Coke this permit related to?

2 A. Quench tower number 1.

3 Q. Could you point to the jury where you see that,
4 please?

5 A. Okay.

6 Q. And there's some language where it says
7 "describe the process or unit", do you see that?

8 A. Yes.

9 Q. Would you read that for the jury, please?

10 A. "Incandescent foundry coke is transported in a
11 standard gauge railcar into a tower. Approximately
12 a four-minute period in each cycle. This unit has
13 a large stack area, 1,017 square feet, therefore,
14 the upward velocity is lower and less apt to
15 entrain particulates in the steam plume."

16 Q. And guess what I'm going to have you do? First
17 of all, where it talks about "the unit has a large
18 stack area", do you know what that means?

19 A. Yes.

20 Q. Would you tell the jury what that means,
21 please?

22 A. It's -- well it's the cross-sectional area of
23 the tower.

24 Q. And by cross --

25 A. The width in feet and/or inches and the length

1 in feet and/or inches.

2 Q. This would be the opening of the tower?

3 A. It would be the opening of the tower, yes.

4 Q. Okay. And then it goes on to say that "The
5 upper velocity is lower and less apt to entrain
6 particulates in the steam plume." Do you see that
7 phrase?

8 A. Yes.

9 Q. Do you understand what that means?

10 A. Yes.

11 Q. Would you explain that to the jury, please?

12 A. Basically, what we're dealing with in a quench
13 tower, you have to take the incandescent coke and
14 rapidly cool it, otherwise it can basically -- it's
15 carbon and it becomes consumed. So you have to
16 quench it very quick. When you dump large
17 quantities of water on this railcar full of hot
18 incandescent coke, you get an immediate large --
19 generation of a large amount of steam, and the
20 velocity of the steam rising upward would pull
21 particulates off the coke and emit them to the air.

22 So what this is saying is by having a large
23 cross-sectional area as opposed to a narrow area,
24 the velocity is less, and, therefore, the
25 entrainment of particulate is less. So you don't

1 have the particulate matter being transferred into
2 the air.

3 Q. And that word "entrainment" that you used, what
4 does that mean, "entrainment of particulate"?

5 In the phrase says "less apt to entrain
6 particulates." I'm just wondering what does the
7 word "entrain" mean.

8 A. Basically you have the air movement caused by
9 the rapid formation of the steam, it's basically
10 wind if you want to call it that, grabbing the
11 particulate and pulling it upward.

12 Q. Okay. Would you make the exhibit larger again
13 please, Lauren? And could you just make the bottom
14 part bigger, please?

15 Now, you see on here, Mr. Kamholz signed this?

16 A. Yes.

17 Q. And your name is on here also?

18 A. Yes.

19 Q. Okay. And would you just read the special
20 conditions for the jury please down at the bottom,
21 this area here?

22 A. "This emission point shall be maintained as a
23 standby unit. Use is limited to less than
24 10 percent of total quenches. The installation of
25 baffles is not required due to unreasonable cost

1 and physical impairments."

2 Q. Now, did you write that, or did somebody else
3 write that clause in there?

4 A. That is my handwriting.

5 Q. All right. And when you -- when you wrote this
6 and you talked about it's limited to less than
7 10 percent of the total quenches, total quenches
8 measured over what period of time?

9 A. There was -- I would say on an annual basis.

10 Q. Okay.

11 A. Because typically we looked at emissions based
12 on an annual basis.

13 Q. All right. And how is that -- if you know, how
14 was it to be determined what the usage was?

15 A. We would -- I guess I didn't have a way to
16 check that. We would rely on Mr. Kamholz or who's
17 ever in charge of that at Tonawanda Coke to keep
18 below that limit.

19 Q. I see. And was he ever -- was it -- was it
20 the -- in your view, at least was it the facility's
21 obligation to let DEC know what the usage was?

22 A. Yes, it would have been.

23 Q. All right. Did you ever inform Mr. Kamholz
24 that that was a facility obligation?

25 A. He would have received a copy of this permit,

1 so via -- via his copy of this permit, he would
2 have been informed of that requirement.

3 Q. So your view was, simply by the language here,
4 that that would put him and Tonawanda Coke on
5 notice that it was their obligation to let DEC know
6 if the usage exceeded 10 percent?

7 A. Yes.

8 Q. To be clear, you never told him that was his
9 obligation?

10 MR. PIAGGIONE: Objection, your Honor.

11 Asked and answered. I'll permit it. It is. But
12 I'll permit it. What was your answer?

13 THE WITNESS: Repeat that, please.

14 BY MR. PERSONIUS:

15 Q. To be clear, you never told him that other than
16 what you put in the permit?

17 A. No. I don't think so.

18 Q. All right. Could we go, Lauren, please to
19 Government Exhibit 19.04 in evidence.

20 Do you recognize -- we can make it bigger if we
21 need to. Do you recognize what this is,
22 Mr. Foersch?

23 A. Yes, basically a newer rendition of the
24 previous form.

25 Q. Okay. Well, we're going make part of it a

1 little bigger. The top part, Lauren, could you
2 please make that bigger?

3 Are you able to tell, Mr. Foersch, from making
4 the top half of this bigger, what quench tower this
5 relates to?

6 A. It appears to be quench tower number 2.

7 Q. That would be the other one?

8 A. Yes.

9 Q. Could you make the -- thank you, Lauren. And
10 could you make the bottom part bigger? Thank you.

11 And again this is -- this is signed by you?

12 A. Well, showing that I did the inspection yes.

13 Q. All right. And was this permit that you issued
14 for the quench tower number 2?

15 A. Yes.

16 Q. All right. And at the time this was issued, if
17 you can -- can you read that? It's very hard to
18 read. Can you read that sentence that I just put
19 the bracket in front of?

20 A. It says this quench tower does have an approved
21 baffle system.

22 Q. Okay. And the date of this document is what,
23 please? Do you remember? Or can you tell?

24 A. It was issued in March of 1984.

25 Q. All right. And as of -- as of that date, do

1 you know if there were baffles in quench tower
2 number 2?

3 A. Yes.

4 Q. Were there?

5 A. Yes.

6 Q. Okay. You can take that down, Lauren, please.
7 Would you go please to Government Exhibit 3521.04
8 for identification?

9 Do you recognize this exhibit, Mr. Foersch?

10 A. Yes, I do.

11 Q. All right. And was this -- is this a copy of a
12 letter you sent to Tonawanda Coke?

13 A. Yes.

14 Q. And the date was when?

15 A. October 22nd, 1984.

16 Q. All right. And did it relate to a planned EPA
17 inspection at Tonawanda Coke?

18 A. Yes.

19 MR. PERSONIUS: Okay. Your Honor, I offer
20 it.

21 MR. PIAGGIONE: No objection, your Honor.

22 THE COURT: Mr. Linsin?

23 MR. LINSIN: No objection, your Honor.

24 THE COURT: Okay. 3521.04 received into
25 evidence, no objection. And may be published.

1 (Government's-Exhibit 3521.04 was received
2 into evidence.)

3 MR. PERSONIUS: Thank you, Judge.

4 BY MR. PERSONIUS:

5 Q. Just to make it easier to read, Mr. Foersch,
6 would you -- Lauren, would you make that bigger,
7 please?

8 Now, in this letter in the first paragraph you
9 talk about an inspection planned for November 14,
10 1984?

11 A. Yes.

12 Q. And you refer to the EPA coming to the
13 facility?

14 A. Yes.

15 Q. Do you know if the EPA had come to Tonawanda
16 Coke before this date?

17 A. I don't know for sure.

18 Q. All right. Did -- was there an inspection at
19 Tonawanda Coke on November 14 of 1984, do you know?

20 A. I believe so.

21 Q. All right. Did you participate in it?

22 A. Yes.

23 Q. All right. Do you remember anything about that
24 inspection?

25 A. No.

1 Q. Nothing?

2 A. No.

3 Q. Okay. Lauren, could we please go to Government
4 Exhibit 19.05 in evidence? Thank you, Lauren.

5 Mr. Foersch, do you see a letter on the screen?

6 A. Yes.

7 Q. And do you recognize this letter?

8 A. Yes, I do.

9 Q. All right. Again we will I try to move through
10 these. Could you make that bigger, please, Lauren?

11 This letter's dated November 21, 1984, right?

12 A. Yes.

13 Q. And did you remember from the last letter that
14 the EPA inspection was going to be on November 14
15 of 1984?

16 A. Yes.

17 Q. This letter refers back to that inspection, is
18 that true?

19 A. Yes.

20 Q. All right. And in this letter did you make a
21 request to Mr. Kamholz that something be provided?

22 A. Yes, I did.

23 Q. And what was it you asked for?

24 A. Basically the department was updating its air
25 emission inventory. And you have to remember that

1 our operating permit system was basically evolving
2 at that time. We only had the battery and the
3 boiler house and the two quench stacks listed as
4 emission points. And it had come to our attention
5 that the by-products area most likely included a
6 number of emission sources that would require
7 permits.

8 Q. Okay. So this was a request?

9 A. This was a request, yes.

10 Q. All right. Lauren, could we go to Government
11 Exhibit 19.07 in evidence, please?

12 Do you recognize this exhibit, Mr. Foersch?

13 A. Yes, I do.

14 Q. All right. Thank you, Lauren.

15 This is a letter that you sent to Mr. Kamholz
16 dated March 5th of 1985?

17 A. Correct.

18 Q. So it's about four months after -- four or five
19 months after the last letter?

20 A. Yes.

21 Q. And it indicates that you got a process diagram
22 from Tonawanda Coke?

23 A. Yes.

24 Q. And what was the purpose of this letter?

25 A. To follow up on the inspection that was

1 performed, and to identify the emission points that
2 we felt would be required under the current
3 regulations to obtain permits.

4 Q. All right. Do you see that -- well, I put it
5 back. Do you see the word "exempt" is handwritten
6 in?

7 A. Yes, I do.

8 Q. Whose handwriting is that?

9 A. That was mine.

10 Q. What was your intent in putting the word
11 "exempt" there?

12 A. Basically we originally identified a vent on
13 WO, which stands for wash oil still. After my
14 review of our regulations, I felt that there was an
15 exemption that might apply based on the type of
16 liquid that was stored in that tank. And as I
17 recall it, I asked Mark for additional information
18 regarding the vapor pressure of the wash oil that
19 was in the tank. And it was such that we would
20 be -- it was -- the material in the tank didn't
21 volatilize, didn't evaporate readily, and therefore
22 very little would be emitted to the atmosphere, and
23 basically there was an exemption granted based on
24 the typical low emissions that you would expect.
25 Q. Okay. As of 1985 were there, under the state

1 rules, exemptions for certain types of emission
2 points?

3 A. Yes, there were.

4 Q. Okay. And to the extent that emission points
5 were exempt, was it understood they would not have
6 to appear on the flow diagrams that were submitted
7 to you?

8 A. They wouldn't have to, no, I guess not.

9 Q. Could we go, Lauren, please, to Defense Exhibit
10 QQQ.01, which is in evidence?

11 There's a photograph on the screen,
12 Mr. Foersch. Do you see that?

13 A. Yes.

14 Q. And it's identified as Defendants' Exhibit
15 QQQ.01?

16 A. Yes.

17 Q. All right. Do you recognize what's shown in
18 that photograph?

19 A. It appears to be some piping in the by-products
20 area. And the large building in the background is
21 the coal handling building.

22 Q. Okay. I'm going to try not to do it backwards.
23 I put an arrow next to a pipe that's standing up?

24 A. Yes.

25 Q. Okay. And do you know what that is?

1 A. No.

2 Q. All right. Do you remember on how many
3 occasions you inspected the by-products area at
4 Tonawanda Coke?

5 A. Rough estimate, 15 times.

6 Q. All right. And it may have -- did it vary from
7 time to time how much time you spent in
8 by-products? How much of your --

9 A. Yes.

10 Q. -- five hours you'd spend there?

11 A. Yes.

12 Q. Okay. Do you remember what the -- what the
13 longest period of time was you spent in by-products
14 on those 15 occasions?

15 A. No.

16 Q. All right. Can you give us any sense at all --
17 without guessing, any sense of how long you would
18 spend inspecting by-products when you looked at it?

19 A. Two hours.

20 Q. Two hours. All right. And as you were
21 inspecting by-products, is one of the things you
22 were doing to look for emission points?

23 A. Yes.

24 Q. Okay. And this -- where I've put this arrow,
25 is it your testimony that you never noticed that --

1 that pipe?

2 A. Yes.

3 Q. Okay. Can we agree that appears to be an
4 emission point?

5 MR. PIAGGIONE: Objection, your Honor.
6 Now he's leading.

7 MR. PERSONIUS: And it is.

8 THE COURT: I'll allow the question. You
9 may answer if you can.

10 THE WITNESS: Yes.

11 BY MR. PERSONIUS:

12 Q. Okay. Thank you. Now, as we continue from the
13 mid '80s into the mid '90s, would it be fair to say
14 that you would have been going back to Tonawanda
15 Coke at least on an annual basis?

16 A. Yes.

17 Q. And spending five hours or so at the facility?

18 A. Yes.

19 Q. And during that period of time from 1985 to
20 1995, would you have gone to by-products -- you can
21 take that down, Lauren.

22 -- would you have gone to the by-products area
23 every time or just periodically?

24 MR. PIAGGIONE: Objection again, your
25 Honor. This had been asked and answered.

1 THE COURT: I'll permit it. Overruled.

2 THE WITNESS: Periodically.

3 BY MR. PERSONIUS:

4 Q. Okay. What would determine whether you went to
5 by-products during a given inspection?

6 A. There was no set criteria. My annual
7 inspection typically keyed on the emissions off the
8 battery. And I imagine time permitting, I'd spend
9 as much time in the by-products area as I could.

10 Q. Okay. But, again, during that time period your
11 main focus was on the battery?

12 A. Yes, was still on the battery.

13 Q. During that whole period, was that your
14 decision or was that guidance you got from your
15 supervisor?

16 A. That was typically directed to go out and do a
17 visible emissions inspection on the battery.

18 Q. It came from your supervisor?

19 A. Yes.

20 Q. All right. Could we go, please, to, Lauren, to
21 Government Exhibit in evidence 3521.10?

22 Do you see on the screen a memorandum,
23 Mr. Foersch?

24 A. Yes.

25 Q. Do you recognize it?

1 A. Yes.

2 Q. Are you the author of it?

3 A. Yes.

4 Q. Okay. Please make it bigger, Lauren.

5 The date of this memorandum is October 18,
6 1994?

7 A. Correct.

8 Q. And you did a memo to a Michael Podd, P-O-D-D,
9 correct?

10 A. Yes.

11 Q. All right. And who was Mr. Podd at the time?

12 A. He would have been employed in the hazardous
13 waste remediation section.

14 Q. All right. Do you remember what the reason was
15 you sent this memorandum to him?

16 A. Not exactly, no.

17 Q. All right. There is a -- would you highlight
18 that sentence please, Lauren?

19 Would you read that sentence please,
20 Mr. Foersch?

21 A. "The firm historically has been in compliance
22 with our regulations with only an occasional upset
23 or malfunction causing any problem."

24 Q. Those were your words?

25 A. Yes.

1 Q. And at the time you wrote those on October 18
2 of 1994, to your knowledge was that accurate?

3 A. Yes.

4 Q. Can we go please, Lauren, to Government
5 Exhibit 19.11.1 in evidence?

6 Do you recognize this exhibit, Mr. Foersch?

7 A. Yes.

8 Q. Okay. This letter was addressed to you --

9 A. Yes.

10 Q. -- from Mr. Kamholz?

11 A. Yes.

12 Q. Okay. We're going to make it a little bigger
13 so it's easier to read. I think that's good
14 enough, thank you.

15 All right. Now, the "regarding" on this is
16 number 2 quench tower?

17 A. Yes.

18 Q. That was the tower to the east?

19 A. Yes, it was.

20 Q. And do you remember receiving this letter?

21 A. Yes.

22 Q. And do you have a recollection of what
23 Mr. Kamholz was asking for in the letter?

24 A. Yes.

25 Q. And what was that?

1 A. Basically the tower at that time was quite
2 tall, looks like about 70 feet, and he was asking
3 if he could lower the height of the -- basically
4 remove the upper portion of the tower and leave
5 just the remaining lower portion in place.

6 Q. All right. I'm not -- I'd like to make that
7 paragraph bigger, please, Lauren. It's the third
8 paragraph.

9 I'm not going to ask you to read this out loud,
10 Mr. Foersch, but you've read this -- this paragraph
11 before, right?

12 A. Yes.

13 Q. Okay. You're familiar with the argument that's
14 being set forth in this paragraph?

15 A. Yes.

16 Q. Would you explain what your understanding is of
17 that argument to the jury please?

18 A. It's basically a repeat of the argument that
19 was made for quench tower number 1, as far as being
20 low to the ground and wide that there would be less
21 entrainment and carry-out of any particulate into
22 the air.

23 Q. When you say "low to the ground", what is your
24 reference point? What being low to the ground?

25 A. Well, I'm -- it says it would only be 40 feet

1 high as opposed to it started at 70.

2 Q. Almost cutting it in half?

3 A. Yes.

4 Q. All right. And after you received this letter,
5 what did you do with it?

6 A. I would have discussed it with my supervisors.

7 Q. At the time who was that please? This is 1996
8 if that helps.

9 A. Probably Henry Sandonato -- Stanley Gubner or
10 Henry Sandonato, one or the other.

11 Q. All right. Do you see -- put the whole letter
12 up again, please. And then, Lauren, make that part
13 there bigger, please. It's the handwritten part of
14 the letter.

15 There's handwriting there, do you see it?

16 A. Yes.

17 Q. And whose handwriting is that?

18 A. That would be mine.

19 Q. All right. And it refers to "discussed with HS
20 1/6/97", is that what it says?

21 A. That appears what I read too, yes.

22 Q. And HS would have been whom, please?

23 A. Henry Sandonato.

24 Q. And do you remember the substance of your
25 conversation about this letter with Mr. Sandonato?

1 A. Not the specifics, no. But it would have been
2 in regards to the arguments that Tonawanda Coke had
3 made relative to the environmental impact of, you
4 know, lowering the stack and stuff.

5 Q. Okay. All right. This -- this concept of a
6 lowered stack and less of the particulates coming
7 out because you've got less velocity in the steam,
8 am I describing it correctly, is that the point?

9 MR. PIAGGIONE: Again, it's leading, your
10 Honor. Objection.

11 THE COURT: All right. It's out there.
12 Why don't you ask him a question again, please.

13 BY MR. PERSONIUS:

14 Q. Okay. I'm trying to simplify the point. Is
15 the point that if the tower is shorter, you're
16 going to have less steam velocity, and therefore
17 it's going to pull fewer of the particulates into
18 the atmosphere?

19 A. Yes.

20 Q. That's the argument?

21 A. Yes, that would be part of it.

22 Q. And did you discuss that argument with
23 Mr. Sandonato?

24 A. Yes.

25 Q. All right. And did he indicate to you whether

1 he agreed or disagreed with that argument?

2 A. I believe he agreed.

3 Q. Okay. And did you have a point of view on that
4 argument as to whether or not it had validity?

5 A. Yes.

6 Q. What was your viewpoint?

7 MR. PIAGGIONE: Objection, your Honor. I
8 believe that's irrelevant at this point.

9 THE COURT: I'm sorry, say that again.

10 MR. PIAGGIONE: It's irrelevant. He's
11 already indicated that they had agreed in this
12 letter that they were going to permit this.

13 MR. PERSONIUS: This is about the -- not
14 whether they agreed to the reduction, your Honor.
15 It's the argument that was being made about
16 velocity and pulling out the particulates.

17 MR. PIAGGIONE: Again, it's irrelevant,
18 your Honor.

19 THE COURT: What's the relevancy?

20 MR. PERSONIUS: I'll ask it a different
21 way.

22 BY MR. PERSONIUS:

23 Q. Did you discuss your reaction to this argument
24 with Mr. Kamholz?

25 A. Repeat that.

1 Q. Were there times when you talked to Mr. Kamholz
2 about this argument that he made regarding the
3 height of the towers and the velocity of the steam?

4 A. Yes, there were.

5 Q. And did you share with him what your view was
6 regarding this argument?

7 A. Yes, I did.

8 Q. Okay. And what was the view you shared with
9 Mr. Kamholz?

10 A. I basically agreed in principle with his
11 arguments.

12 Q. Okay. Did you communicate that to Mr. Kamholz
13 that you agreed?

14 A. Yes, I did.

15 Q. Okay. On one occasion or more than one
16 occasion?

17 A. I believe this discussion came up more than
18 once. So I would say on more than one occasion.

19 Q. All right. Do you remember what period of
20 time?

21 A. Probably throughout the time that I did
22 inspections there.

23 Q. Okay. At Tonawanda Coke?

24 A. Yes.

25 Q. Okay.

1 A. I mean, it was probably brought up a few
2 different times.

3 Q. All right. And did you discuss the argument
4 with Mr. Sandonato on just this one occasion or
5 other occasions also?

6 A. Probably just the once.

7 Q. All right. Did you communicate to Mr. Kamholz
8 what Mr. Sandonato's perspective was on this --
9 this argument?

10 A. No.

11 Q. Okay. Now, could we go please, Lauren, to
12 Government Exhibit in evidence 19.12?

13 Do you recognize this exhibit, Mr. Foersch?

14 A. Yes.

15 Q. Okay. And this is your letter response to
16 Mr. Kamholz?

17 A. Yes.

18 Q. All right. Please make that part bigger,
19 Lauren.

20 That's the body of the letter, Mr. Foersch,
21 correct?

22 A. Yes.

23 Q. And you indicate you're answering Mr. Kamholz's
24 letter, right? In the first paragraph?

25 A. Yes.

1 Q. And this concerns the reduction in the height
2 of tower number 2?

3 A. Yes.

4 Q. Okay. And do you indicate in the letter that
5 the reduction in the height is being approved?

6 A. Yes.

7 Q. Okay. Then there's a paragraph that I put a
8 red bracket around. Would you read that to the
9 jury, please?

10 A. It should also be noted that Part 214.5(a)
11 requires that all wet quench towers be equipped
12 with a baffle system.

13 Q. Now, was there a reason that you put that
14 paragraph in this letter?

15 A. Yes.

16 Q. All right. And tell the jury, please, if you
17 would, what that reason was.

18 A. I seem to recall it being twofold, just, again,
19 to notify him or make him aware obviously that the
20 baffles were required. And at the time I wrote
21 this letter to Mark, I wasn't sure if the baffles
22 were located in the top part of the quench tower or
23 if they were located in the bottom part. So I was
24 afraid he might say, oh, you said I could take the
25 top of the tower off, that's where the baffles are,

1 they're not there anymore. And I wanted to make it
2 clear that the department still expected to see
3 baffles in place.

4 Q. Now, after you sent this lower to Mr. Kamholz,
5 did you have one or more later conversations with
6 him about your letter? And specifically about this
7 paragraph?

8 A. Probably.

9 Q. All right. That's not a very confident answer.
10 Is the probably more than a guess?

11 A. Yes.

12 Q. All right. Do you have a recollection of
13 whether this paragraph was discussed with
14 Mr. Kamholz once or more than once?

15 A. I know the argument had been made on a couple
16 of occasions anyways relative to the inefficiencies
17 of baffles, and that it wasn't maybe cost effective
18 or something to that effect.

19 Q. All right. And when Mr. Kamholz made those --
20 those points in his discussions with you, did you
21 respond?

22 A. Yes.

23 Q. Okay. Do you remember what your response was?

24 A. As I said earlier, I typically agreed with him
25 relative to, you know, the baffle -- you know, the

1 efficiencies of the baffle.

2 Q. Now, after this letter was sent -- it's
3 government -- I keep saying this letter. It's
4 Government Exhibit 19.12, which was sent on
5 January 6th of 1997 -- did you specifically talk
6 about, with Mr. Kamholz at any time, about this
7 sentence or paragraph you had put in this letter?

8 A. No, I don't.

9 Q. You don't recall a specific reference to this
10 letter?

11 A. Talking about, no.

12 Q. All right. But these discussions about the
13 relative merits of baffles continued?

14 MR. PIAGGIONE: Objection, your Honor,
15 this has already been asked and answered.

16 THE COURT: We're working through this
17 though, so overruled.

18 You may answer that question and then move on,
19 Mr. Personius.

20 MR. PERSONIUS: I will, Judge.

21 BY MR. PERSONIUS:

22 Q. Did the discussions about the relative merits
23 of baffles with Mr. Kamholz continue after this
24 letter --

25 A. Yes.

1 Q. -- was sent. In this letter in January of 1997
2 did you -- you continued to do inspections at
3 Tonawanda Coke?

4 A. Yes, I did.

5 Q. And they continued to be on an annual basis?

6 A. Yes.

7 Q. Okay. After this letter of January of 1997, as
8 part of your inspections at Tonawanda Coke, do you
9 have a recollection if you ever checked inside of
10 quench tower number 2?

11 A. Could you restate that?

12 Q. Yes. I'm sorry. This letter that we've been
13 referring to from January of 1997, after that
14 letter had been sent to Mr. Kamholz, start it this
15 way, you continued to do your annual inspections,
16 correct?

17 A. Correct.

18 Q. And as part of those inspections, do you
19 remember if you ever went to quench tower number 2
20 to check to see if there were baffles in there?

21 A. Yes, I did.

22 Q. All right. Do you remember when you did that?

23 A. No.

24 Q. All right. How many times did you do it after
25 that?

1 A. I believe once.

2 Q. Do you remember when that was?

3 A. I can only approximate it.

4 MR. PIAGGIONE: Objection. He's already
5 asked and answered that he did not know the date.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: Probably 2005, in that area.

8 MR. PIAGGIONE: Object again, your Honor.
9 He said he's guessing.

10 THE COURT: You may cross-examine.

11 Overruled.

12 BY MR. PERSONIUS:

13 Q. All right. I want to be clear, I don't want a
14 guess from you. If what you're giving is a guess,
15 tell us, because we don't want a guess.

16 Do you have a recollection when it was?

17 A. No, I do not.

18 Q. All right. But you recall one time after this
19 letter was sent you checked inside tower number 2?

20 A. Yes.

21 Q. And your purpose in looking inside the tower
22 was what?

23 A. To determine compliance with our Part 214
24 regulation.

25 Q. Okay. And what specifically of that regulation

1 were you looking for?

2 A. To basically see if the baffles were in place.

3 Q. Do you remember what you saw when you looked?

4 A. No, I don't --

5 Q. Okay.

6 A. -- exactly. I recall either -- I know it was a
7 violation, I recall that. But whether or not there
8 was some baffles still remaining in place, or
9 whether they were all removed, that part of it I
10 don't remember.

11 Q. When you say "there was a violation", did you
12 mean a violation of the baffles requirement?

13 A. Yes, I do.

14 Q. Okay. And was Mr. Kamholz with you on this
15 occasion when you looked in the quench tower?

16 A. Yes, he was.

17 Q. All right. Did you have a conversation with
18 him?

19 A. I recall reminding him again of the requirement
20 in Part 214 that baffles be in place.

21 Q. Okay. Did he respond?

22 A. No. I don't --

23 Q. And did you ever check again to see if the
24 baffles had been -- had been put in there?

25 A. No, I did not.

1 Q. All right. Was there a -- was there a reason
2 you didn't go back and check again -- check again
3 in tower number 2 to see if baffles were in place?

4 A. Yes. Yes.

5 Q. Okay. Can you tell the jury what the reason
6 was, please?

7 A. Based on my past dealings with Mr. Kamholz, if
8 I typically needed something done or looked at, or
9 there was a report of excessive smoke from the
10 facility, I'd call up Mr. Kamholz and ask him to
11 look into it and take care of it, and it typically
12 was always done to my satisfaction. And I made the
13 assumption he'd do the same thing with the baffles.

14 Q. All right. These conversations you'd had with
15 him about the relative merits of the baffle system,
16 did you continue -- I think you said you continued
17 to have those conversations with him throughout the
18 period you did your inspections, correct?

19 A. Correct.

20 Q. And should we understand those conversations
21 continued after this occasion that you've testified
22 that you looked and saw either no baffles or a
23 violation in tower number 2?

24 A. No, I don't believe we discussed it after that.

25 Q. Now, do you remember, Mr. Foersch, that

1 Mr. Kamholz was arrested in late December of 2009?

2 A. Yes.

3 Q. And you learned about that somehow? That he
4 had been arrested.

5 A. Yes.

6 Q. And do you remember that a private investigator
7 named Tom Thurston came to talk to you on two
8 occasions in January --

9 A. Yes, I do.

10 Q. -- of 2010?

11 A. Yes, I do.

12 Q. Okay. And he prepared a report each time,
13 correct?

14 A. Yes.

15 Q. You've seen those reports?

16 A. Yes.

17 Q. Right. And do you agree that in both of those
18 reports you told Mr. Thurston that you were aware
19 that there were no baffles?

20 MR. PIAGGIONE: Objection, your Honor.

21 This is not a statement in evidence, and it's also
22 leading.

23 THE COURT: Overruled.

24 MR. PIAGGIONE: And it's not proper on
25 direct.

1 THE COURT: You may answer -- or ask the
2 question.

3 BY MR. PERSONIUS:

4 Q. I'll ask it again. You've reviewed Mr.
5 Thurston's two reports, right?

6 A. Yes.

7 Q. I've given them to you, right?

8 A. Yes.

9 Q. And actually when Mr. Thurston came to see you
10 the second time, he brought with him his report
11 from the first time he came to see you, right?

12 A. Yes, he did.

13 Q. Okay. And he allowed you to read it, right?

14 A. Yes.

15 Q. And he allowed you to make changes to it,
16 right? Do you remember that?

17 A. He asked me to sign it.

18 Q. And he also said I you want you to read this
19 and before you sign it, I you want you to make --

20 MR. PIAGGIONE: Objection, your Honor.
21 This is leading and this is direct.

22 THE COURT: Overruled. You may answer.
23 Did he say that or not?

24 BY MR. PERSONIUS:

25 Q. Do you remember the second time Mr. Thurston

1 gave you his first report and said I'd like you to
2 read this?

3 A. Yes.

4 Q. And he said if you want to make any changes to
5 it, please do so?

6 A. Yes.

7 Q. And included in that first report was an
8 indication that you were fully aware that neither
9 tower number 1 nor tower number 2 had baffles in
10 them, correct? Do you remember his report said
11 that?

12 A. His report said that, yes, it did.

13 Q. And what you asked him to do was to take out
14 the word "fully"?

15 MR. PIAGGIONE: Objection, your Honor.

16 THE COURT: Overruled.

17 BY MR. PERSONIUS:

18 Q. Is that true?

19 A. Yes, I did.

20 Q. Okay. And once he took out "fully", he asked
21 you to sign the document, right?

22 A. Yes.

23 Q. And you declined to sign or initial the first
24 report, right?

25 A. Yes.

1 Q. Okay. And the reason for that was that in
2 between the first visit by Mr. Thurston and the
3 second visit by Mr. Thurston, you had talked to a
4 DEC attorney --

5 MR. PIAGGIONE: Objection, your Honor.
6 This is continually leading, talking now about
7 hearsay with a --

8 THE COURT: It is leading at this point.
9 So, sustained.

10 BY MR. PERSONIUS:

11 Q. Between the first Thurston visit and the second
12 Thurston visit had you spoken to someone about the
13 first visit?

14 A. Yes.

15 Q. Okay. Who was that?

16 A. I would have spoken to DEC attorneys.

17 Q. All right. And do you remember who that was?

18 A. Yes.

19 Q. Who was it?

20 A. Theresa.

21 Q. Theresa's last name is?

22 A. Mucha.

23 Q. Okay. M-U-C-H-A?

24 A. Yes.

25 Q. And so when Mr. Thurston came the second time,

1 and he had you read the report from the first
2 interview?

3 A. Yes.

4 Q. Okay. And you told him to take out the word
5 "fully", right?

6 A. Yes.

7 Q. And the reason that you wouldn't then initial
8 or sign the report was because you had talked to
9 Miss Mucha?

10 A. No. I did it on my own accord.

11 Q. All right. But the -- other than have him take
12 out the word "fully" in front of "aware", that's --
13 you agreed to his first report?

14 MR. PIAGGIONE: Objection again, asked and
15 answered.

16 THE COURT: I'll permit this, and move on.

17 MR. PERSONIUS: Yes.

18 THE WITNESS: Yes.

19 BY MR. PERSONIUS:

20 Q. Okay. Thank you. Following 1997 did you
21 continue to do inspections at Tonawanda Coke
22 through your retirement?

23 A. Yes.

24 Q. Okay. And could we have Defense Exhibit HHH
25 for identification put on the screen for

1 identification?

2 Do you recognize this exhibit, Mr. Foersch?

3 A. Yes.

4 Q. Okay. And just generally, what is it, please?

5 A. It's basically a printout from entries that we
6 would make into our computer system after
7 performing an inspection so that it's logged into
8 the system.

9 Q. All right. And this -- this particular
10 inspection was on what date, please?

11 A. Can I see the rest of the form?

12 Q. That's all we have for this exhibit. I put a
13 red line to try to draw your attention to what I
14 understand to have been the date. Is that helpful
15 or not?

16 A. The way that form was, as I recall it -- and
17 I've been retired for three and a half years -- the
18 scheduled and achieved date were sometimes
19 questionable. But I would think that that October
20 of '99 is the correct date.

21 Q. It's a 1999 inspection?

22 A. Yes.

23 Q. Okay.

24 MR. PERSONIUS: Your Honor, I offer this.

25 MR. PIAGGIONE: No objection, your Honor.

1 MR. LINSIN: No objection, your Honor.

2 THE COURT: Okay. HHH received, no
3 objection.

4 (Defendants' Exhibit HHH was received into
5 evidence.)

6 THE COURT: And it may be published if you
7 choose to do that.

8 MR. PERSONIUS: Thank you, Judge.

9 BY MR. PERSONIUS:

10 Q. Would you put the whole exhibit up, Lauren,
11 please. Sheila, I'm sorry.

12 All right. We have this document that's
13 Defendant's Exhibit HHH in evidence on the screen,
14 Mr. Foersch?

15 A. Yes.

16 Q. Okay. And, Sheila, would you please just make
17 that upper part bigger? All right. This is a
18 record you made of a routine inspection you did at
19 Tonawanda Coke sometime in 1999?

20 A. Yes.

21 Q. All right. And was it your practice to prepare
22 a document similar to this each year that you would
23 go to Tonawanda Coke?

24 A. Yes.

25 Q. Sometimes with more details than others?

1 A. Yes.

2 Q. The use of this, this type of document -- was
3 there a point in time when you started using this
4 format rather than the -- the earlier format which
5 was like a memo of some type?

6 A. There was, yes, but I couldn't tell you the
7 date.

8 Q. Can we agree as of 1999 and moving forward that
9 this was the format you used to document your
10 inspections?

11 A. Yes.

12 Q. And there should be in the file a document
13 similar to this for each year that you did your
14 inspection?

15 A. Yes.

16 Q. Sometimes with more detail than others --

17 A. Correct.

18 Q. -- correct. Could we go To Defendants' Exhibit
19 KKK for identification, please?

20 THE COURT: How much more time do you have
21 on direct, a while?

22 MR. PERSONIUS: Probably a half hour.

23 THE COURT: Okay. We'll break now for
24 lunch, and we'll see you back here at 2:15. We'll
25 start then, okay?

1 Don't discuss the case, please. Enjoy the day.

2 A little cool out there, but nice.

3 (Jury excused from the courtroom.)

4 THE COURT: Mr. Foersch, stay right there
5 until the jury is released, please.

6 THE WITNESS: Sorry.

7 THE COURT: Okay. You may step down.
8 Thank you. We'll see you at 2:15.

9 (Lunch recess was taken.)

10 (Jury seated.)

11 THE COURT: Welcome back, ladies and
12 gentlemen. Please have a seat.

13 Okay. We have Mr. Gary Foersch back on the
14 stand. He remains under oath. This is still
15 direct examination.

16 Mr. Personius -- Mr. Foersch remains under
17 oath -- you may continue.

18 MR. PERSONIUS: Thank you, Judge.

19 THE COURT: The attorneys and parties are
20 back present. The jury is here, roll call waived.

21 BY MR. PERSONIUS:

22 Q. Good afternoon, Mr. Foersch.

23 A. Good afternoon.

24 Q. Do you remember, Mr. Foersch, that before we
25 broke for the lunch recess, you had been testifying

1 about this last occasion when you looked inside of
2 quench tower number 2?

3 A. Yes.

4 Q. Okay. And that you had indicated in response
5 to my questions you couldn't recall the date when
6 that happened?

7 A. Yes.

8 Q. Okay. Can we agree that it was at some time
9 after the issuance of the Title V permit in 2002?

10 A. Yes.

11 MR. PIAGGIONE: Objection, your Honor.

12 He's already indicated he doesn't remember.

13 THE COURT: He just said yes. So I'll
14 permit that.

15 BY MR. PERSONIUS:

16 Q. And do you remember I also asked you why it was
17 after you looked into the tower and saw no baffles
18 that you never looked again? Do you recall I asked
19 you that?

20 A. Today?

21 Q. Yes.

22 A. Oh, I looked again.

23 Q. You looked again after the time you looked and
24 saw no baffles?

25 A. About a year later. Oh, looked again. No.

1 Excuse me. I got that wrong. No, I never looked
2 again.

3 Q. Never looked again?

4 A. Never looked again.

5 Q. Do I recall correctly that what you told us
6 before the lunch break is that because you were
7 relying on Mr. Kamholz to take care of it?

8 A. Yes.

9 Q. Okay. You testified in the grand jury on
10 July 29th of 2010, do you recall that?

11 A. Yes.

12 Q. And when you went into the grand jury, you put
13 your hand up and you took the oath to tell the
14 truth, right?

15 A. Yes.

16 Q. Okay. For identification, Lauren, could we
17 please have Government Exhibit 3521.16 on the
18 screen for identification?

19 And do you see on the screen the exhibit
20 sticker 3521.16, Mr. Foersch?

21 A. Yes.

22 Q. And do you recognize this as the first page of
23 your transcript of your grand jury testimony that
24 you provided on July 29, 2010?

25 A. Yes.

1 Q. Lauren, I think we want to go, please, in this
2 exhibit to page 24. Could we try that and see if
3 that gets us where we need to be. Thank you. It
4 does. Could you make the bottom portion larger
5 please, Lauren?

6 Now, on page 24 of your grand jury transcript
7 starting on line 17 you were asked: "And then at
8 annual inspections after that, did you go back to
9 check for the baffles?" Your answer was: "No, I
10 did not." And the question was: "Why did you check
11 for them that day, but not the other inspections
12 you went back for?" And your answer back in July
13 of 2010 was: "I don't know. It was just easier to
14 do that day or something. I don't recall why."
15 Was that your testimony back in July of 2010?

16 A. Yes, it was.

17 Q. You can take that down, Lauren.

18 And, Sheila, would you please put up, this is
19 for identification, Defendants' Exhibit KKK.

20 Mr. Foersch, do you see on the screen the first
21 page of an exhibit that's marked Defendants'
22 Exhibit KKK?

23 A. Yes.

24 Q. I don't expect you to get much out of that.

25 But could we go to the next page please,

1 Lauren?

2 I just want you to take a look, if you would,
3 at the first couple paragraphs of this exhibit,
4 this second page of this exhibit. And my question
5 is do you recognize this correspondence? Please
6 just read it to yourself.

7 A. Yes.

8 Q. Okay. Do you recognize this letter?

9 A. Yes.

10 Q. Okay. And do you recall that the EPA came back
11 to -- you can take it down, Lauren. Thank you.

12 Do you recall that the EPA came back to inspect
13 Tonawanda Coke in May of 2000?

14 A. No.

15 Q. Okay. Could you put it back up, please?

16 A. Oh, I got to read it?

17 THE COURT: There must be some way to
18 avoid that, but I'm not sure how.

19 BY MR. PERSONIUS:

20 Q. I just want you to read it to yourself and when
21 you're done let me know.

22 A. I'm sorry, I didn't look at all the dates. I
23 just generally scanned the letter.

24 Q. Let us know when you're done reading it.

25 There's a whole system here that you've got to get

1 used to.

2 A. Okay.

3 Q. You can take it down, Lauren. Thank you.

4 Do you recall that the EPA came back to
5 Tonawanda Coke to do an air inspection again in May
6 of 2000?

7 A. Yes.

8 Q. Okay. Did you participate in that inspection?

9 A. I don't recall if I did or not.

10 Q. Do you have any -- other than the fact that the
11 inspection took place in May of 2000, do you have
12 any other recollection of the inspection?

13 A. No.

14 Q. Sheila, would you please put Defendants'
15 Exhibit F in evidence on the screen?

16 Do you see Defendant's Exhibit F, Mr. Foersch?

17 A. Yes.

18 Q. Is it familiar to familiar to you?

19 A. Yes.

20 Q. And this is what's called a full compliance
21 evaluation checklist?

22 A. Correct.

23 Q. All right. How frequently -- well, let me ask
24 this before that. The handwriting that's on the
25 document, not the signature, but the handwriting,

1 do you recognize that handwriting?

2 A. Yes, I do.

3 Q. Whose is it, please?

4 A. It's mine.

5 Q. All right. The signature down at the bottom is
6 Mr. Sitzman?

7 A. Yes, it is.

8 Q. All right. Could you make that part bigger
9 please, Lauren -- or Sheila.

10 This full compliance evaluation checklist, how
11 frequently were they completed with respect to
12 Tonawanda Coke?

13 A. Should have been annually.

14 Q. There should be one of these done every year?

15 A. Yes.

16 Q. And what -- what is the purpose -- if you know,
17 what was the purpose of completing this document
18 each year?

19 A. Basically a checklist to remind us of things
20 to, you know, observe when we go out there, and to
21 indicate whether or not we could determine
22 compliance with those individual sections that are
23 on there.

24 Q. All right. There is like a little paragraph
25 near the top. Could you make that larger, please,

1 Sheila? Thank you.

2 The paragraph that's been made larger refers to
3 the full compliance evaluation as a comprehensive
4 evaluation of the compliance status of the
5 facility?

6 A. Yes.

7 Q. Okay. And what -- what was done -- what had to
8 be done before this form was filled out with
9 regards to the inspection that you did, was there
10 anything in particular you had to do before this
11 document could be completed?

12 A. You had to do an inspection obviously. But,
13 outside of that, I don't --

14 Q. Let me ask a further question. I'm not being
15 clear. You've told us before that the primary
16 areas of Tonawanda Coke that you would look at
17 would be the ovens, the boiler, boiler area and the
18 by-products area?

19 A. Yes.

20 Q. Okay. And I think you also told us that --
21 that you didn't necessarily inspect each of those
22 three areas every year?

23 A. Yes.

24 Q. Okay. When one of these forms, these full
25 compliance evaluation checklists was completed, did

1 you first have to do an inspection of each of those
2 three areas before this form could be completed?

3 A. Yes.

4 Q. So when -- so that would be mean every year
5 then you were inspecting all the areas?

6 A. As long as all the boxes, the appropriate
7 boxes, are checked.

8 Q. I see. Okay. Can we go back, Sheila, please
9 to the larger exhibit? And please make that part
10 bigger. Thank you.

11 Now, on this particular form, Defendant's
12 Exhibit F, do you see that there's boxes in the
13 left column for all except two of the queries?

14 A. Yes.

15 Q. And tell the jury, if you would, what does that
16 mean? The two I guess specifically were the check
17 marks in the third box over, what does that tell
18 us?

19 A. That it's not applicable. You're saying where
20 the --

21 Q. Yes.

22 A. I can't see the N/A, but third box over is N/A.

23 Q. Not applicable?

24 A. Yes.

25 Q. The reason then that you would have put not

1 applicable for -- for annual compliance
2 certificate, do you know why you put not applicable
3 there?

4 A. No.

5 Q. Okay. And then for source test you put not
6 applicable. Can you tell us why?

7 A. That would probably be because there would have
8 been no annual -- some emission points require
9 annual stack testing as part of their compliance
10 determination. And in this case, source testing
11 wasn't required.

12 Q. Okay. Can you tell from this -- the way this
13 full compliance evaluation checklist is completed,
14 which is Defendant's Exhibit F, can you tell us
15 whether there would have been a full inspection of
16 the by-products area?

17 A. I would say there would have been.

18 Q. There would have been?

19 A. Yes.

20 Q. And you were satisfied then with what you saw?

21 A. Yes.

22 Q. Okay. You can take that down, Sheila, please.

23 Lauren, could you please put Government

24 Exhibit 31 in evidence on the screen?

25 Do you see that Government Exhibit 31 is now on

1 the screen, Mr. Foersch?

2 A. Yes.

3 Q. Do you recognize what this document is?

4 A. Yes, I've seen it before.

5 Q. Okay. Can you tell the jury what it is,
6 please? There's more to the exhibit. Would it
7 help you to see the rest of it?

8 A. I don't know that it would help. I'm not
9 really -- I've seen the form. I'm not really that
10 familiar with it.

11 Q. Okay. All right.

12 A. I never had to fill one out myself.

13 Q. All right. Could we go to, Lauren, this is
14 also in evidence, Government Exhibit 32, please?

15 Okay. Do you have on your screen Government
16 Exhibit 32, Mr. Foersch?

17 A. Yes.

18 Q. Okay. And I'm not tricking you. This is
19 slightly different from the one that we just had up
20 there. But do you recognize what that document is?

21 A. I've seen them, yes.

22 Q. Are you familiar with this type of document?

23 A. Not -- not in any detail, no.

24 Q. All right. You can take that down, please,
25 Lauren.

1 And, Sheila, could you please put up in
2 evidence Defendants' Exhibit I?

3 You see Defendant's Exhibit I on your screen,
4 Mr. Foersch? Down in the lower right-hand --

5 A. Yes.

6 Q. We're going make the upper part a little
7 bigger.

8 Do you recognize this is one of your annual
9 inspection reports?

10 A. Yes.

11 Q. Okay. And the date that this inspection was
12 done is what, please?

13 A. 8/23/2007.

14 Q. Okay. Could we go to the -- were you part of
15 this inspection, by the way?

16 A. Yes, I believe I was.

17 Q. Can we interpret from -- can we interpret from
18 that first page that Mr. Sitzman and Miss Webster
19 also would have been part of it?

20 A. Yes.

21 Q. Okay. Could we go to the second page, please,
22 and just the first -- just make the first paragraph
23 larger?

24 Do you see on the second page of this exhibit,
25 the first paragraph has been made slightly larger?

1 A. Yes.

2 Q. Do you see it makes reference to the ongoing
3 Tonawanda Coke benzene study?

4 A. Yes.

5 Q. Okay. And we can go back to it, if you need
6 to. Do you remember the date of the inspection?
7 Would you like to see the first page again?

8 A. 2007 something.

9 Q. Okay. We can go back to the first page,
10 please. Thank you.

11 Okay. It was August 23rd of 2007?

12 A. Yes.

13 Q. Do you have a recollection that on this date
14 you and Miss Webster and Mr. Sitzman met with
15 Mr. Kamholz to talk about the Tonawanda benzene
16 study?

17 A. Yes, I believe I do.

18 Q. Back in 2007?

19 A. Yes.

20 Q. Do you remember -- you can take that down,
21 please.

22 Do you remember going back to Tonawanda Coke on
23 May 28th of 2008, not for an inspection, but for a
24 visit with Mr. Carlacci and I think Mr. Sitzman and
25 Miss Webster to talk about the benzene study again?

1 A. Yes, I think I do, yes.

2 Q. All right. And you met for a period of time
3 with Mr. Kamholz in the conference room at
4 Tonawanda Coke, do you recall that?

5 A. Conference or his office. One or the other,
6 yes.

7 Q. It was over in that office complex area you
8 pointed out to us --

9 A. Yes.

10 Q. -- at the beginning of your testimony?

11 A. Yes.

12 Q. Do you remember how long that total visit
13 lasted?

14 A. No.

15 Q. All right. And was the focal point of the
16 discussion in Mr. Kamholz's office have to do with
17 this emission study?

18 A. Yes.

19 Q. Okay. And then after that do you remember
20 going over to the -- to the by-products area?

21 A. Yes.

22 Q. Okay. To get from the office area over to the
23 by-products area, do you remember how you got
24 there?

25 A. Not -- no.

1 Q. Did you walk? Did you go in a vehicle?

2 A. I would imagine in a vehicle.

3 Q. Okay. Why would you imagine?

4 A. Because that's what we typically did.

5 Q. There's some distance between where

6 Mr. Kamholz's office is and the by-products area?

7 A. Right.

8 Q. So when you got over to the by-products area,
9 did you then spend some time over there, over in
10 the by-products area that day?

11 A. Yes.

12 Q. Yes?

13 A. Yes.

14 Q. Okay. And by then you had been dealing with
15 Mr. Kamholz for almost 30 years?

16 A. Yes.

17 Q. Okay. And did you notice anything about his
18 demeanor that day where he seemed withdrawn or
19 unwilling to share information?

20 A. No.

21 Q. All right. And did you notice if he was using
22 any kind of a mask that day?

23 A. I don't recall if he had one on or not. It's
24 not uncommon.

25 Q. When you say "it's not uncommon", what's not

1 uncommon?

2 A. For a worker at Tonawanda Coke to have a
3 respirator hanging around their neck.

4 Q. Including Mr. Kamholz?

5 A. Yes.

6 Q. Okay. And if you know, what is -- what is the
7 reason that the employees would have a mask hanging
8 around their neck?

9 A. There are certain areas on the battery and
10 maybe confined areas in the plant that you have to
11 go into that OSHA would require that you wear a
12 respirator.

13 Q. All right. And did -- those occasions when you
14 saw Mr. Kamholz with a mask or respirator hanging
15 around his neck, did you find that unusual or
16 noteworthy?

17 A. No.

18 MR. PERSONIUS: Your Honor, may I have a
19 minute, please?

20 THE COURT: Certainly.

21 MR. PERSONIUS: Your Honor, we have no
22 more questions at this time. Thank you, Mr.
23 Foersch.

24 THE COURT: Okay, Mr. Personius, thank
25 you.

1 Any questions, Mr. Linsin?

2 MR. LINSIN: Thank you, your Honor. May I
3 proceed, Judge?

4 THE COURT: You may proceed, yes.

5 MR. LINSIN: Thank you.

6 CROSS-EXAMINATION BY MR. LINSIN:

7 Q. Good afternoon, Mr. Foersch.

8 A. Good afternoon.

9 Q. We've met once before I believe, but my name is
10 Greg Linsin. I represent Tonawanda Coke. And I
11 just have a couple of questions for you.

12 You testified that a lot of the time you went
13 out and inspected the Tonawanda Coke facility your
14 attention was focused on the battery of that plant,
15 is that correct?

16 A. Yes, sir, it was.

17 Q. Is it accurate that part of the reason your
18 attention was focused on the battery was that the
19 DEC recognizes that the battery at a coke plant is
20 one of the more significant potential sources of
21 emissions?

22 A. Yes, it is.

23 Q. And as a matter of fact, you would routinely go
24 around and inspect the battery, the lids, and the
25 off-take pipes, and even the oven doors for leaks,

1 is that correct?

2 A. Yes.

3 Q. And is it your understanding also that there
4 came a time when -- when there was actually a daily
5 inspection of those leaks from the battery, is that
6 correct?

7 A. Yes, there was.

8 Q. And do you recognize those daily inspections as
9 typically referred to as 303 inspections?

10 A. Yes, I do.

11 Q. All right. And is it accurate both in the
12 inspections you conducted on an annual basis on
13 behalf of DEC and these daily 303 inspections that
14 there is an allowable limit under the inspection
15 protocol, an allowable limit for leaks from the
16 various components I just mentioned, the oven doors
17 and the lids on the battery and the off-take pipes,
18 is that correct?

19 A. Yes.

20 Q. All right. And there's -- so there's a
21 recognition that however careful the facility is
22 being, however carefully the doors are being
23 maintained and the lids are being sealed, there is
24 a recognition that there will be some leaks, and
25 that margin is accounted for in the inspection

1 protocol, is that correct?

2 A. Yes.

3 Q. Now, how many ovens again are at the battery,
4 do you recall, at Tonawanda Coke?

5 A. I believe it's -- in operation last thing I
6 knew I think it was 60.

7 Q. Sixty separate ovens. And the leaks that we
8 were just talking about that are observed and
9 recorded, these are leaks from the ovens
10 themselves, correct?

11 A. Yes.

12 Q. And so they are leaks while the coke is
13 actually in process, correct?

14 A. While the coking is going on, yes.

15 Q. All right. And so is it accurate to
16 understand, Mr. Foersch, that the leaks we're
17 talking about that are monitored are leaks from the
18 ovens of raw coke oven gas?

19 A. Yes.

20 Q. And those leaks, as we've just said, they're
21 monitored, and there's an expectation that the
22 facility will try to do what they can to control
23 it, but those leaks as long as they are within the
24 parameters of the test protocol are entirely
25 lawful, is that correct?

1 MR. PIAGGIONE: Objection, your Honor,
2 this is leading. I let it go for a while, but now
3 it's a narrative. Leading.

4 THE COURT: All right. Do you understand
5 the question?

6 THE WITNESS: Yes.

7 THE COURT: All right. I'll allow him to
8 answer. Overruled.

9 BY MR. LINSIN:

10 Q. If leaks are detected from the ovens during
11 these inspections and they are within the
12 parameters allowed or provided for in the test
13 protocol, those leaks are lawful, is that correct?

14 A. Yes, they are.

15 Q. And those are leaks of coke oven gas before it
16 is processed through the by-products area, is that
17 correct?

18 A. Yes.

19 Q. Now, you testified on direct that you recall
20 one occasion -- after Tonawanda Coke facility
21 received its Title V permit, you recall one
22 occasion when you actually went over and looked up
23 into quench tower number 2, correct?

24 A. Yes.

25 Q. All right. Now, you were out at the facility,

1 as I believe you testified, every year to perform
2 these inspections, correct?

3 A. Yes.

4 Q. And is it true that during the five hours or so
5 that you would spend on these inspections, that you
6 would observe quenches being conducted in quench
7 tower number 2?

8 A. Yes, I would.

9 Q. And is it also true, Mr. Foersch, that when you
10 would see a quench tower -- I'm sorry, a quench
11 operation being conducted in quench tower number 2,
12 that you would also, even if you were in a
13 different part of the plant, you would also observe
14 certain dust or particles falling down in the area
15 in which you were standing or where you were in
16 your vehicle?

17 MR. PIAGGIONE: Your Honor, objection
18 again. This is continuing leading questions one
19 after another. This is not a hostile witness.
20 This is direct testimony.

21 THE COURT: Well, there's a distinction
22 here. The witness was called by Mr. Personius, so
23 there is some leeway that I will grant, and in
24 addition to that, I'll allow it for 611(a)
25 purposes. You may continue.

1 MR. LINSIN: Thank you.

2 BY MR. LINSIN:

3 Q. Would you like me to repeat the question?

4 A. Yes, sir.

5 Q. My question is simply this: When you were at
6 the facility and you would see a quenching
7 operation occurring in quench tower number 2, even
8 if you were someplace else in the plant, over on
9 Broadway, or in some other location, if the air
10 pattern was blowing that quenching steam in your
11 direction, you would see or feel particulate matter
12 or ash, if you will, falling down from the steam,
13 is that correct?

14 A. That is correct.

15 Q. And isn't it also true, Mr. Foersch, that given
16 what you were seeing and observing during this
17 quenching operation, that you knew -- subsequent to
18 the Title V permit being issued, you knew that
19 there were no baffles in that quench tower, even
20 without having gone over and looked directly up
21 into the tower, isn't that correct?

22 A. No, it's not.

23 Q. Is it your testimony, Mr. Foersch, that even if
24 there were quench -- I'm sorry, baffles in a quench
25 tower, you would still see the same ash falling out

1 of the steam plume off of a quench operation?

2 A. That's been my experience, yes.

3 Q. And that's because these baffles are just not
4 very efficient, is that correct?

5 MR. PIAGGIONE: Objection, your Honor.

6 THE COURT: No, I'll permit the answer.
7 You may answer.

8 THE WITNESS: That's my belief, yes.

9 MR. LINSIN: All right. I have nothing
10 further. Thank you, your Honor.

11 THE COURT: Okay, Mr. Linsin, thank you.

12 Okay. Mr. Piaggione, if you're going to
13 cross-examine you may.

14 CROSS-EXAMINATION BY MR. PIAGGIONE:

15 Q. Good afternoon, Mr. Foersch.

16 A. Good afternoon.

17 Q. Mr. Foersch, what is your educational
18 background?

19 A. High school diploma.

20 Q. Okay. And when you were employed at DEC, were
21 there permit applications for a clean air permit
22 done in writing?

23 A. Yes, there were.

24 Q. Okay. And were the permits issued in writing?

25 A. Yes, they were.

1 Q. Okay. And when you were employed at DEC, did
2 Tonawanda Coke apply for permits in writing?

3 A. Yes, they did.

4 Q. And did Tonawanda Coke receive permits in
5 writing from the DEC?

6 A. Yes, they did.

7 Q. And when you were employed at DEC, if there was
8 a modification for a clean air permit, was that
9 modification application made in writing?

10 A. Yes, it was.

11 Q. And if DEC granted that modification, was that
12 modification granted in writing?

13 A. Yes, it was.

14 Q. All right. And the entire time that you were
15 at DEC, did that procedure of change?

16 A. No.

17 Q. Okay. And did you tell Mark Kamholz at any
18 time that you had the authority to change or modify
19 a condition in the permit?

20 A. No. I didn't have that authority.

21 Q. And based upon your conversations with
22 Mr. Kamholz, did Mr. Kamholz know you did not have
23 that authority?

24 MR. PERSONIUS: Object, your Honor, as to
25 what Mr. Kamholz knew.

1 THE COURT: Yeah, sustained.

2 BY MR. PIAGGIONE:

3 Q. Did you have conversations with Mr. Kamholz as
4 to your -- the limits of your authority?

5 A. No.

6 Q. Okay. Did you have conversations with
7 Mr. Kamholz regarding the effectiveness of baffles?

8 A. Yes.

9 Q. Okay. And you agreed with him you said, is
10 that correct?

11 A. Yes, I did.

12 Q. But did you always end that conversation by
13 saying the rules still required baffles?

14 A. I wouldn't necessarily end it that way, but --

15 Q. Would you tell him that?

16 MR. PERSONIUS: Your Honor, he just
17 testified he didn't, so I object.

18 THE COURT: Yeah, I'm going to overrule
19 the objection.

20 But that question is not a good question, so
21 reput a question, please.

22 MR. PIAGGIONE: Thank you, your Honor.

23 BY MR. PIAGGIONE:

24 Q. When you had these conversations with
25 Mr. Kamholz regarding the effectiveness of the

1 baffles, did you say to him you still needed

2 baffles in the tower?

3 A. Yes, on occasion.

4 Q. Okay. Did you ever tell him that he did not
5 need baffles in the tower?

6 A. Tower 2.

7 Q. Tower 2, yes. East quench tower. Did you ever
8 tell him that he never needed baffles in the east
9 quench tower?

10 A. No.

11 Q. Okay. Now, you had this conversation with him,
12 you said, sometime after 1997. Where were you in
13 respect to the east quench tower?

14 MR. LINSIN: Objection, your Honor. I
15 believe that misstates the testimony. The
16 testimony, as I recall it, was the conversation
17 occurred after the issuance of the Title V permit,
18 which was in 2000 --

19 MR. PIAGGIONE: If I recall correctly, I
20 heard both, your Honor.

21 THE COURT: Let's clarify, please.

22 BY MR. PIAGGIONE:

23 Q. The conversation you had with Mr. Kamholz in
24 the east quench tower the last time you were at the
25 east quench tower, was that after the letter in

1 1997?

2 A. Yes.

3 Q. Okay. And where were you standing when you had
4 that conversation?

5 A. It would have been outside the -- let's see,
6 east door on the quench tower.

7 Q. Okay. And can you describe what it would be
8 like to enter the quench tower?

9 A. To get to the quench tower?

10 Q. To get -- to enter the east quench tower to see
11 the baffles.

12 A. Well, to approach the quench tower you have to
13 climb down a bit of a pile of coke, and I actually
14 don't go into the oven -- or into the -- into the
15 tower. You stand at the door and look in. It's
16 not -- it's an electrically charged area, it's wet,
17 and it's a dangerous place, and you stay as far
18 away as you can to still be able to observe and
19 determine compliance.

20 Q. Okay. And did you tell him at that time that
21 the tower needed baffles?

22 A. I advised him that the regulations required
23 baffles.

24 Q. And did Mark -- did Mr. Kamholz raise an
25 argument about upward velocity at that time?

1 A. No.

2 Q. Okay. Did he argue about the efficiency of
3 baffles?

4 A. No.

5 Q. All right. He didn't object, is that correct?

6 A. Yes.

7 Q. And based upon your conversation and your
8 previous dealings Mr. Kamholz, you expected him to
9 place baffles in the east quench tower?

10 A. Yes.

11 Q. Okay. And the next year did you -- did you
12 conduct the annual compliance inspection for the
13 next year at Tonawanda Coke?

14 THE COURT: Put that question again,
15 please.

16 BY MR. PIAGGIONE:

17 Q. Sorry. After that conversation did you return
18 the next year to conduct an annual compliance
19 evaluation inspection?

20 A. Yes, I did.

21 Q. Okay. And during that inspection, did you ask
22 Mr. Kamholz if he had put baffles in the east
23 quench tower?

24 A. Yes, I did.

25 Q. And what did he say?

1 A. He said yes.

2 Q. Okay. And you never checked the east quench
3 tower again, is that correct?

4 A. No, I did not.

5 Q. All right. And you said you inspected the
6 by-products area 15 times. Is that 15 times
7 since -- from 1984 to 2009?

8 A. I would say -- yeah, that's a good
9 approximation.

10 Q. Okay. So that's approximately 15 times in 25
11 years, is that correct?

12 A. Yes.

13 Q. Okay. Now, with respect to the inspections
14 that you conducted at Tonawanda Coke, when you went
15 there, did Mark Kamholz always escort you around
16 the facility?

17 A. Yes, he did.

18 Q. Okay. And is it fair to say that Mr. Kamholz
19 knew where you went on inspections?

20 A. Yes, he did.

21 Q. And did you always follow basically the same
22 routine when you conducted inspections?

23 A. Pretty much so, yes.

24 Q. Okay. And when Title V -- when the Title V
25 permit was issued, did the focus of your inspection

1 change?

2 A. Yeah, somewhat.

3 Q. Okay. Was it spent more on reviewing documents
4 than looking at apparatus?

5 A. Yes, it was.

6 Q. Okay. And then your Title V permit compliance
7 inspections, did that include checking every
8 condition of the permit physically?

9 A. No. No, it wouldn't.

10 Q. Okay. And yet you would check off that they
11 were in compliance, was that only in respect to
12 what you observed, is that correct?

13 A. Yes.

14 Q. Okay. And is it fair to say you relied upon
15 Tonawanda Coke to be in compliance with the
16 conditions of the Title V permit you did not view
17 during your inspection, is that correct?

18 A. Yes.

19 Q. Okay.

20 MR. PIAGGIONE: Can I have a moment, your
21 Honor?

22 THE COURT: Yes.

23 MR. PIAGGIONE: If I may continue for one
24 moment?

25 THE COURT: Certainly.

1 BY MR. PIAGGIONE:

2 Q. Thank you. Mr. Foersch, you said Mr. Kamholz
3 was with you on every inspection, is that correct?

4 A. Yes.

5 Q. Okay. So he would know those conditions that
6 you did not inspect during your -- he would not
7 know which conditions you did not inspect --
8 withdrawn.

9 He would know what conditions in the Title V
10 permit that you did not physically inspect during
11 your inspection, is that correct?

12 A. I don't think he would have any idea what I was
13 going to do on a particular inspection.

14 Q. Okay. Incidentally, were you ever trained to
15 be a RCRA inspector at any time?

16 A. No.

17 Q. Thank you.

18 THE COURT: Anything, Mr. Personius?

19 REDIRECT EXAMINATION BY MR. PERSONIUS:

20 Q. Mr. Foersch, when you and I were going through
21 your direct testimony this morning, do you remember
22 that I referred to a couple of occasions when you
23 were interviewed by a private investigator named
24 Mr. Thurston?

25 MR. PIAGGIONE: Objection, your Honor.

1 We're now going beyond the scope of the cross.

2 MR. PERSONIUS: This was covered by
3 Mr. Linsin, your Honor.

4 THE COURT: I'm sorry?

5 MR. PERSONIUS: It was covered by
6 Mr. Linsin.

7 MR. PIAGGIONE: It's defense, your Honor.

8 THE COURT: No. That's -- that's
9 testimony that can be inquired into. I'll permit
10 it, but you have to repute the question please.

11 BY MR. PERSONIUS:

12 Q. Do you remember during my questioning of you
13 this morning that we discussed your two contacts
14 with an investigator named Thurston in January
15 of 2010?

16 A. Yes.

17 Q. Okay. And the questions had to do with you
18 acknowledging to Mr. Thurston that you knew there
19 were not baffles in quench tower number 2, do you
20 recall that?

21 A. The question again, please?

22 Q. Yes. Do you remember that the reason I brought
23 up Mr. Thurston was to address your awareness that
24 there were no baffles in quench tower number 2, do
25 you remember that?

1 A. Yes.

2 Q. And we went through him showing you the first
3 report the second time he saw you, do you recall
4 that?

5 A. Yes.

6 Q. And he gave you an opportunity to change his
7 report remember? Do you remember that?

8 A. Yes.

9 Q. Okay. And the only change you asked for was
10 the word "fully" be removed from in front of the
11 word "aware", right?

12 A. Yes.

13 Q. And am I correct that you agreed that you told
14 Mr. Thurston both -- on both times you saw him in
15 January of 2010 that you were aware there were not
16 baffles in quench tower number 2?

17 A. But at what time -- I documented there -- well,
18 I didn't document, I observed there not being
19 baffles.

20 Q. Did you tell Mr. Thurston you were aware that
21 there were no baffles in quench tower number 2?

22 A. Yes.

23 Q. And isn't it true, Mr. Foersch, that you knew
24 from the time you last looked in quench tower
25 number 2 until you retired, you knew in your heart

1 of hearts that there were not baffles in that
2 quench tower, isn't that true?

3 MR. PIAGGIONE: Objection again, your
4 Honor. This is direct, and this is leading.

5 THE COURT: Well, let's get an answer and,
6 that's it. Move on.

7 You may answer.

8 THE WITNESS: I had a gut feeling that
9 there weren't baffles in there.

10 BY MR. PERSONIUS:

11 Q. Thank you. Now, you were asked by
12 Mr. Piaggione on his examination about
13 conversations you had with Mr. Kamholz regarding
14 this issue with the flow of the steam and the
15 particulates and the height of the tower, do you
16 remember that topic?

17 A. Yes.

18 Q. Okay. And he asked you if you told Mr. Kamholz
19 that you still needed baffles, do you recall that?

20 A. Yes.

21 Q. And you said occasionally I did, correct?

22 A. Yes.

23 Q. And can we infer from that or conclude from
24 that on other occasions when you had the
25 conversation, you did not tell him that baffles

1 were still required, true?

2 A. Yes.

3 Q. All right. Now, you've testified in response
4 to a question by Mr. Piaggione that a year after
5 this last inspection of quench tower number 2 that
6 you had a conversation with Mr. Kamholz?

7 A. Yes.

8 Q. And that what you've told the jury is that you
9 actually asked him do you have baffles in that
10 quench tower, is that what you're recalling?

11 A. Yes, I did.

12 Q. And you're telling the jury that your
13 recollection is that he said yes, there were
14 baffles in there?

15 A. Yes.

16 Q. Could we please put just for identification,
17 Lauren, back on the screen Mr. Foersch's grand jury
18 testimony, which is Government Exhibit 3521.16.

19 And there is your -- the first page of your
20 grand jury testimony, Mr. Foersch, from July
21 29, 2010, is that correct?

22 A. Yes.

23 Q. Would you go please, Lauren, to page 23. Could
24 you make that upper portion larger, please?

25 The question on line 1 was: "And you say you

1 looked in there and you saw some baffles in
2 disrepair." And your answer was: "Correct." Do you
3 see that?

4 A. Yes.

5 Q. Lauren, could you put the full page back up
6 again, please. And would you make that part bigger
7 please?

8 And then you were asked on line 23, "But you
9 didn't document it?" And your answer was, "no".
10 And then the question was: "Did you follow up with
11 him?" Do you see that?

12 A. Yes.

13 Q. Would you go to the next page please, Lauren?
14 We're on page 24.

15 And your answer was: "No." And then the
16 question was: "Why not?" And your answer was: "I
17 guess one of those discretionary things that you
18 sometimes do." Is that correct?

19 A. Yes.

20 Q. And to be clear, when you testified in the
21 grand jury two and a half years ago, you didn't
22 tell the grand jury about this conversation you're
23 telling us that you had today, is that true?

24 A. True.

25 MR. PERSONIUS: All right. May I have a

1 minute, Judge?

2 Your Honor, we have nothing further.

3 Thank you, Mr. Foersch.

4 THE COURT: Okay. Mr. Linsin, anything?

5 MR. LINSIN: Nothing further, your Honor.

6 Thank you.

7 THE COURT: Okay.

8 MR. PIAGGIONE: I have a few more
9 questions, your Honor, if I may.

10 THE COURT: Okay.

11 RECROSS-EXAMINATION BY MR. PIAGGIONE:

12 Q. Mr. Foersch, you said based upon your gut
13 feeling in prior cross -- rather redirect
14 examination. Based upon your gut feeling did you
15 ask Mr. Kamholz were there baffles in the east
16 quench tower, and he said yes, is that correct?

17 A. Correct.

18 Q. Okay. And did you ever tell Mr. Kamholz that
19 baffles were not required in the east quench tower?

20 A. No.

21 Q. Okay. And with respect to the grand jury
22 testimony, did you note that there were
23 inaccuracies in that testimony when you read it?

24 A. Not -- grand jury or Thurston's?

25 Q. Withdrawn. With respect to the grand jury

1 testimony, you said you never followed up. Yet
2 there is this follow-up that you did on the
3 following year inspection. That seems to be in
4 conflict. Can you explain that?

5 A. Yes, I can.

6 Q. Would you, please?

7 A. I was never asked the question in the grand
8 jury if I did any subsequent -- if I did any
9 follow-up on it or whatever.

10 Q. Well, the question was: "Did you follow up on
11 it?" Did you misunderstand the question in the
12 grand jury?

13 A. I'd like to read it again if I could.

14 Q. 3521.16.0023. We have to go down one more
15 line.

16 THE COURT: It's the next page.

17 MR. PIAGGIONE: It's the next page, I'm
18 sorry. 24. Okay. All right. Could you read that
19 again?

20 Do you want to explain that now?

21 THE WITNESS: What I was referring to --

22 THE COURT: Well, no, you can't do to that
23 way.

24 BY MR. PIAGGIONE:

25 Q. Okay. Does that refresh your memory at all?

1 A. Yes, it does.

2 Q. Do you want to explain why you said you did not
3 follow up in the grand jury?

4 A. I was referring to in the short-term, like
5 within a month or two, and not that I never
6 inquired about it again.

7 MR. PIAGGIONE: No further questions, your
8 Honor.

9 THE COURT: Okay.

10 MR. PERSONIUS: I'll try not to do this,
11 Judge, but --

12 FURTHER REDIRECT EXAMINATION BY MR. PERSONIUS:

13 Q. Could we please have for identification,
14 Lauren, the grand jury testimony, Government
15 Exhibit 3521.16?

16 Do you see that on the screen, Mr. Foersch?

17 A. Yes.

18 Q. Lauren, could you please go to the page we were
19 on, page 24? And the portion of this that you were
20 just referring to, Mr. Foersch, is at the top of
21 page 24, is that true?

22 A. Yes.

23 Q. Okay. Would you please make that bigger,
24 Lauren?

25 Now, on that same page, on line 15, you were

1 asked: "Did you ever ask him if he did?" And your
2 answer was: "That I don't remember if I did or
3 not." Is that what your testimony was two and a
4 half years ago in the grand jury?

5 A. Yes.

6 Q. And that was referring to talking to
7 Mr. Kamholz about whether or not he had put baffles
8 in tower number 2, correct?

9 A. Could I read a little more of it?

10 Q. Sure. Would you let Mr. Foersch read page 24,
11 Lauren?

12 Have you had a chance to read page 24?

13 A. Yes.

14 Q. Do you agree that's what your response related
15 to?

16 A. Yes, I do.

17 MR. PERSONIUS: Nothing further, Judge.
18 You can take that down, Lauren.

19 THE COURT: Keep it up. Do you want to
20 refer to it, or are you going somewhere else?

21 MR. PIAGGIONE: No where else. I can ask
22 from here.

23 FURTHER RECROSS-EXAMINATION BY MR. PIAGGIONE:

24 Q. Is it your testimony today that you do remember
25 the conversation?

1 A. Yes.

2 Q. Okay. Thank you.

3 MR. PIAGGIONE: No further questions.

4 MR. PERSONIUS: No, Judge.

5 THE COURT: Thank you.

6 Okay. Mr. Foersch, I think that concludes your
7 testimony. You are excused. Thank you very much.

8 Mr. Linsin.

9 MR. LINSIN: Thank you, your Honor.

10 Tonawanda Coke calls Mr. Ken Eng.

11 THE COURT: Good afternoon. If you would
12 approach the witness stand, sir. We'll tell you
13 when to stop. And right there. Please stop.
14 Don't enter. Turn towards the jury, please.

15 K E N N E T H E N G, having been duly sworn as a
16 witness, testified as follows:

17 THE COURT: Okay. Be careful when you
18 enter. Get comfortable. Good afternoon.

19 THE WITNESS: Good afternoon.

20 THE COURT: All right. I'm going to ask
21 you to speak in the direction of the jury at the
22 microphone. That's usually pretty friendly, as
23 long as you speak at it in a conversational tone.
24 Keep in mind that you're here to benefit the jury.
25 They want to hear what you have to say. But make

1 sure you understand the question that is asked. If
2 you don't, just ask the lawyer or me to repeat it.
3 Be as succinct as can with your answer. If you can
4 answer it with a yes or no, that helps move things
5 along.

6 If there's an objection, wait until I rule on
7 the objection, and then I'll tell you what to do;
8 either complete your answer, start it again, wait
9 for a next question. Do you understand those
10 instructions?

11 THE WITNESS: I do.

12 THE COURT: Okay. Don't volunteer
13 anything -- that usually complicates things -- if
14 you can avoid it. Sounds like you're going to
15 carry okay on that microphone. State your full
16 name, spell your last name, please.

17 THE WITNESS: My full name is Kenneth Eng,
18 E-N-G.

19 THE COURT: Okay, thank you.

20 Your witness, Mr. Linsin.

21 MR. LINSIN: Thank you, your Honor.

22 DIRECT EXAMINATION BY MR. LINSIN:

23 Q. Good afternoon, Mr. Eng.

24 A. Good afternoon.

25 Q. My name is Greg Linsin. I represent Tonawanda

1 Coke Corporation. Would you please tell the
2 members of the jury where you're employed, sir?

3 A. I'm employed with the United States
4 Environmental Protection Agency in EPA Region 2
5 office in New York City.

6 Q. And how long have you been with EPA?

7 A. I've been with EPA for 41 years and a couple
8 months.

9 Q. And what is your current position with the
10 Environmental Protection Agency?

11 A. I'm currently the branch chief, the Air
12 Compliance Branch chief.

13 Q. And is that for Region 2?

14 A. Yes, that is correct.

15 Q. And how long have you held that position, sir?

16 A. From today approximately 25 years.

17 Q. And would you briefly describe your duties as
18 the branch chief of Region 2's Air Compliance
19 Branch?

20 A. Yes. Basically I am the official that is
21 responsible for managing several group of engineers
22 and inspectors as they conduct compliance
23 inspections. And if compliance is not -- is a
24 noncompliance, then would proceed to take the
25 appropriate enforcement action.

1 Q. And Region 2 has responsibility for oversight
2 of environmental compliance in New Jersey, New
3 York, and Puerto Rico, is that correct?

4 A. Yes, including the Virgin Islands.

5 Q. All right. Now, I'd like to direct your
6 attention, please, sir, to 2009, and ask whether
7 there came a time that you became aware that a
8 joint EPA/DEC air compliance inspection was going
9 to be conducted at the Tonawanda Coke facility?

10 A. Okay. Yes.

11 Q. All right. And did you personally participate
12 in that joint inspection of Tonawanda Coke in
13 April?

14 A. I did not.

15 Q. All right. Did other personnel from EPA Region
16 2 participate in that inspection?

17 A. Yes.

18 Q. Who from Region 2 participated?

19 A. Three of my staff, Harish Patel, a senior
20 inspector, Mozey Ghaffari, another senior
21 inspector, and Richard Kan.

22 Q. All right. And what is his position?

23 A. He was a junior inspector.

24 Q. All right. Back at that time?

25 A. Back at that time.

1 Q. All right. And did other personnel from EPA's
2 NEIC office in Denver also participate?

3 A. Yes, they did.

4 Q. And who were this please?

5 A. They were Martha Hamre and Ken Garing.

6 Q. And Hamre is H-A-M-R-E?

7 A. I believe so, yes.

8 Q. All right. Now, following that April 2009 air
9 compliance inspection at Tonawanda Coke, did you
10 receive a report from any of the those five
11 individuals that you just mentioned regarding the
12 results of that inspection?

13 A. Yes.

14 Q. All right. With whom -- how did you receive
15 the report?

16 A. It was a report from the NEIC center. They
17 routine -- if we ask them to participate in
18 inspection, they will develop a report detailing
19 the results of the inspections.

20 Q. And so there came a time when you received a
21 written report from NEIC, is that correct?

22 A. Yes, that is correct.

23 Q. Did you also though receive an oral briefing
24 from Miss Hamre and from Mr. Garing?

25 A. Yes.

1 Q. All right. When did that oral briefing occur?

2 A. I don't know when it did occur. But it
3 occurred before their written report.

4 Q. Before any NEIC written report?

5 A. Before NEIC's written report.

6 Q. And in the oral briefing that you received from
7 Miss Hamre or Mr. Garing, did either of them say
8 anything to you about a pressure relief valve that
9 was observed at the Tonawanda Coke facility during
10 the inspection?

11 A. I do not recall discussions concerning that,
12 no.

13 Q. All right. Did you have discussions with the
14 three personnel from Region 2, Mr. Patel, Mr.
15 Ghaffari, or Mr. Kan, did you have an oral
16 report -- receive an oral report from them?

17 A. Yes, I did.

18 Q. All right. And do you recall about when that
19 oral report was received?

20 A. The oral report -- when they come back from the
21 inspection, they generally tell me what they found
22 in general. And short of that, general highlights
23 of what they found. We did not talk details.

24 Q. All right. In their summary to you --

25 A. Yes.

1 Q. -- oral summary to you, of the findings of
2 this -- do you know how many days this air
3 inspection went on?

4 A. I believe a couple weeks.

5 Q. All right. Did any of them mention to you
6 anything about a pressure relief valve that had
7 been observed on the coke oven gas line at
8 Tonawanda Coke?

9 A. Yes. Harish Patel did mention a pressure
10 relief valve, but we did not have extensive
11 discussions about it, no.

12 Q. All right. Now, do you remember what time
13 in 2009 you received this written report from NEIC?

14 A. I do not.

15 Q. Have you become aware -- since 2009 have you
16 become aware that later in 2009 after this joint
17 inspection that the New York State Department of
18 Environmental Conservation office had issued a
19 notice of violation or an NOV to Tonawanda Coke
20 regarding the need to install baffles in one of the
21 quench towers at that facility?

22 A. Yes.

23 Q. All right. Now, during 2009, were you
24 consulted, or, as far as you know, were any of your
25 staff consulted about the plans by DEC to issue

1 this notice of violation?

2 A. No.

3 Q. Were you aware that it was going to occur
4 beforehand?

5 A. I was not aware that it was going to occur
6 beforehand.

7 Q. But you've subsequently learned that that
8 notice of violation from DEC related to the east or
9 number two quench tower, is that correct?

10 A. That is correct.

11 Q. Now, later in 2009, October, November, did you
12 become involved in discussions regarding the
13 issuance of a notice of violation by EPA regarding
14 the baffles in the quench towers at Tonawanda Coke?

15 A. Yes.

16 Q. And was a decision made by -- are you aware
17 that a decision was made to issue a notice of
18 violation from EPA to Tonawanda Coke regarding the
19 baffles in both of these quench towers?

20 A. Yes.

21 Q. All right. Do you recall approximately what
22 date that was issued?

23 A. It was issued December 7th.

24 Q. Of 2009?

25 A. 2009.

1 Q. Now, before that notice of violation was
2 issued, had anyone -- I'm sorry, let me go back.

3 That notice of violation from EPA, is it
4 accurate to say that it required Tonawanda Coke to
5 install baffles in both of the two quench towers at
6 the facility?

7 A. Yes.

8 Q. All right. Before EPA issued that NOV, were
9 you aware that years before, 15 years before, DEC
10 had actually issued a written exemption to
11 Tonawanda Coke with respect to the need to have
12 baffles in the west or quench tower number 1?

13 A. I was not aware.

14 Q. As far as you know, was anyone on your staff
15 aware of that exemption that had been issued
16 previously by DEC?

17 A. As far as I know, none of my staff was aware of
18 an exemption.

19 Q. Did there come a time in -- toward the end of
20 December in 2009 when you were advised by someone
21 from DEC that there was -- had, in fact, been an
22 exemption issued for these baffles in quench tower
23 number 1?

24 A. Yes.

25 Q. All right. How did you learn about that?

1 A. I learned about that in a call with state air
2 pollution control engineer Larry Sitzman. We had a
3 conversation in which he told me.

4 Q. All right. And do you recall, Mr. Eng, whether
5 you called Mr. Sitzman or whether he called you?

6 A. I do not.

7 Q. All right. As a result of that conversation --
8 well, what did Mr. Sitzman tell you about this
9 issue regarding an exemption?

10 MR. MANGO: Your Honor, I'm going to
11 object. That's hearsay.

12 MR. LINSIN: Your Honor, I'm not offering
13 this for the truth of the matter. It really goes
14 to the state of mind of the hearer and his
15 subsequent actions in response to this
16 communication with Mr. Sitzman.

17 THE COURT: Yeah, and it's being offered
18 against the party --

19 MR. LINSIN: It's a statement of a party
20 opponent.

21 THE COURT: It's within the scope of the
22 duties of Mr. Sitzman, so it would qualify as an
23 exception to the hearsay rule as I see it.

24 So objection overruled.

25 BY MR. LINSIN:

1 Q. All right. Let me ask it again if I may.

2 A. Please.

3 Q. You said you had a conversation with
4 Mr. Sitzman toward the end of December 2009?

5 A. Yes.

6 Q. You don't recall who called whom. But during
7 that conversation, what did Mr. Sitzman tell you
8 about this exemption that DEC had issued to
9 Tonawanda Coke for these baffles in quench tower
10 number 1?

11 A. He told me that the state had issued Tonawanda
12 Coke this exemption to not have to put on baffles
13 provided that the -- they don't use that quench
14 tower for more than 10 percent of the time.

15 Q. All right.

16 THE COURT: Mr. Eng, if you could just
17 move the microphone away from you just a little
18 bit, because you're just a little bit too close, and
19 it causes feedback.

20 THE WITNESS: How's this?

21 MR. LINSIN: We hear you just fine, but if
22 you get too close, it pops on us.

23 BY MR. LINSIN:

24 Q. Did you ask Mr. Sitzman to provide you a copy
25 of this letter memorializing this exemption?

1 A. He offered to provide me a copy of the letter.

2 Q. All right. And did you ever receive a copy of
3 the letter from Mr. Sitzman?

4 A. I did not.

5 Q. Did you ever follow up and ask him for a copy
6 of that letter?

7 A. I did not.

8 Q. Now, as a result of this discussion with
9 Mr. Sitzman, did you have communications with some
10 of your colleagues within Region 2 regarding this
11 NOV that EPA had issued previously in that month?

12 A. Yes, I did.

13 Q. All right. May we have, please, for
14 identification Government's Exhibit 3518.04.

15 I'm going to ask you, first of all, Mr. Eng, if
16 you observe the yellow sticker with the number
17 3518.04?

18 A. I do, on the top.

19 Q. If we can go to the second page, please, and
20 then on to the third page.

21 Do you recognize these -- this document?

22 A. I do.

23 Q. And what is it, sir?

24 A. These are emails -- these are emails that
25 relate to the discussion I had with Larry Sitzman,

1 as well as correspondence from myself and Dore and
2 Barbara McGarry.

3 Q. And when you -- you mentioned someone by the
4 name of Dore?

5 A. Dore. She is my immediate supervisor. She is
6 the director of the Division of Enforcement and
7 Compliance Assistance.

8 Q. And what is Dore's last name, please?

9 A. LaPosta.

10 Q. All right. And her first name is D-O-R-E, is
11 that correct?

12 A. Yes.

13 MR. LINSIN: Your Honor, at this time we
14 would move Government's Exhibit 3518.04 into
15 evidence.

16 MR. MANGO: No objection, your Honor.

17 THE COURT: Okay.

18 MR. PERSONIUS: No objection. Thank you,
19 Judge.

20 THE COURT: Okay. 3518.04 received, no
21 objection. And if you choose, may be published.

22 MR. LINSIN: Yes, I would ask that it be
23 published, your Honor.

24 (Government's Exhibit 3518.04 was received
25 into evidence.)

1 BY MR. LINSIN:

2 Q. And we are now on the third page of this
3 exhibit, and is it correct, Mr. Eng, that this
4 third page of the exhibit actually represents the
5 first portion of this email stream?

6 A. Yes.

7 Q. All right. So, if we could highlight the
8 bottom half, first of all.

9 This would be the first communication in this
10 sequence, is that correct?

11 A. That is correct.

12 Q. All right. And can you just identify the
13 people whose names appear here? Obviously you are
14 the person to whom this last email is addressed,
15 correct?

16 A. Yes.

17 Q. And Miss McGarry's position again, please?

18 A. She is the strategic implementation manager.
19 She was coordinating the Tonawanda Coke --
20 basically the -- the investigation, the enforcement
21 and so forth.

22 Q. All right. And who is if you would please,
23 Karl Mangels?

24 A. Karl Mangels was my section chief at that time.

25 Q. Richard Kan we have already discussed.

1 A. Correct.

2 Q. At the top of the this portion of the page, is
3 it accurate to say Miss McGarry is indicating that
4 there is something that she is going to need today,
5 that is December 30th, 2009, is that correct?

6 A. Yes.

7 Q. All right. Can we back out and then go to the
8 top of the page, please. If we can, let's try and
9 get the rest of this portion.

10 Now, who is it that authored this portion of
11 this email string, sir?

12 A. That would be Barbara McGarry.

13 Q. Was she involved in the investigation herself?

14 A. She was involved in the coordination of the
15 investigation, not -- not the specific activities.

16 Q. All right. And this -- this email that we've
17 highlighted -- I'm sorry, enlarged here is
18 addressed to your immediate supervisor, correct,
19 Miss LaPosta?

20 A. Correct.

21 Q. And who is -- who is this CC'd to at the top,
22 this Patrick Durack?

23 A. He is the deputy director of the division. He
24 reports to Dore.

25 Q. And would you explain, please -- you need not

1 read it, but would you explain what Miss McGarry is
2 communicating here to Miss LaPosta?

3 A. She appears to be telling Miss LaPosta I would
4 be looking into the issue concerning these baffles.

5 Q. And from the context, is this a communication
6 then, an email, that was written following this
7 conversation you just testified about with
8 Mr. Sitzman?

9 A. I'm not sure on when she wrote hers. I don't
10 remember whether she wrote her email before or
11 after I had spoken to Mr. Sitzman.

12 Q. But we can agree it's on the same date,
13 correct, December 30th?

14 A. Yes.

15 Q. 2009?

16 A. Yes.

17 Q. All right. And she explains you're looking
18 into this baffle issue, and she's referencing, in
19 the first line here, an order. Would that be a
20 reference to a possible compliance order that EPA
21 is considering?

22 A. Yes.

23 Q. All right. And at this point now we are --
24 does it fit with your memory, sir, this is about
25 three weeks after EPA has issued its own notice of

1 violation concerning these baffles?

2 A. Yes.

3 Q. All right. And she says in here you're not
4 sure, if I understand -- tell me if I'm wrong in
5 this. You're not sure that baffles that they put
6 in are okay. You are checking, is that correct?

7 A. That is correct.

8 Q. And so do you recall that at the time of this
9 email exchange, Tonawanda Coke had actually put
10 baffles in quench tower number two, the eastern
11 quench tower?

12 A. I did not know when they put in the baffles in
13 the east tower. I didn't -- at that time I did not
14 know.

15 Q. Well, this sentence does say "the baffles that
16 they put in," so does it help refresh your memory
17 that at least there's some discussion about some
18 baffles that have already been installed?

19 A. Yes.

20 Q. Okay. So you were wanting to evaluate whether
21 those -- the baffles that had been installed --

22 A. Correct.

23 Q. -- fit with the requirements, is that correct?

24 A. Yes.

25 Q. And then there is a reference here to -- in the

1 first paragraph -- I don't mean to be jumping
2 around -- to "Our folks were not aware they were
3 using second tower to this frequency." Do you know
4 what that references?

5 A. I do not.

6 Q. In your discussion with Mr. Sitzman, as best
7 you recall, did you receive any information from
8 Mr. Sitzman about what percentage of time either of
9 these quench towers was being used?

10 A. I did not.

11 Q. All right. If we can go to then what would be
12 page 2 of the exhibit. Enlarge the lower portion,
13 please.

14 Now, this is again from Miss McGarry directed
15 to Miss LaPosta, correct?

16 A. Correct.

17 Q. And what is she communicating here?

18 A. She's basically saying that the NOV that we
19 sent addresses both quench towers, and that baffles
20 were needed in both quench towers. And we cited
21 them for both quench towers for not having baffles.

22 Q. You had already issued the NOV, correct?

23 A. That is correct.

24 Q. All right. This communication is at 2:45 in
25 the afternoon on December 30th, correct?

1 A. Yes.

2 Q. And it indicates that you are going to work on
3 a short note that you can forward to the RA that
4 captures this information, right?

5 A. That's correct.

6 Q. And who is the RA?

7 A. That's the regional administrator, Judith Enck.

8 Q. Is that the top EPA official within Region 2?

9 A. Yes.

10 Q. All right. If we can go to the top of this
11 page, please. Yes.

12 Now, did you write this email, Mr. Eng?

13 A. I did.

14 Q. And what time of day did you write it on
15 December 30th, 2009?

16 A. 4:08 p.m.

17 Q. All right. And to whom is this email
18 addressed?

19 A. To Dore LaPosta.

20 Q. Would you please read your email to the members
21 of the jury?

22 A. Yes. "Tonawanda Coke has two wet quench towers
23 on the premises, one located east and one located
24 west of the coke oven battery. During our
25 inspection, our inspectors observed the coke cars

1 going to the east quench tower for quenching. This
2 is the quench tower that Tonawanda Coke had
3 subsequently equipped with baffles. Generally
4 these baffles meet the requirements of Part 214."

5 Q. I don't mean to interrupt you, sir. I
6 apologize. But Part 214 references what now?

7 A. That's the New York Code and Rules and
8 Regulations that relate to the coke ovens.

9 Q. All right. So does this indicate you had
10 checked those regulations to see if the baffles
11 that had been installed in quench tower number 2
12 actually satisfy the requirements of the
13 regulations?

14 A. Yes, I said in general they satisfy.

15 Q. I'm sorry. Please, go ahead.

16 A. "The west quench tower has a history behind it.
17 In speaking to Larry Sitzman of the New York State
18 DEC, he said that the state and Tonawanda Coke had
19 an agreement memorialized in some letter which
20 Larry will send me a copy of that as long as
21 Tonawanda Coke only used this quench tower for
22 backup duty, less than 10 percent of the time, that
23 the state would not require baffles. Although
24 Tonawanda Coke had in its Title V permit
25 application a request not to have to install

1 baffles for this quench tower, citing this
2 agreement with the state, the current Title V
3 permit, which has since expired and has not as yet
4 been renewed, does not acknowledge this agreement.
5 The state accidentally left out this provision, and
6 Tonawanda Coke never caught it. Therefore, the
7 Title V permit requires baffles on both quench
8 towers."

9 Q. All right. Please go ahead.

10 A. "Our December 7, 2009, NOV cites Tonawanda Coke
11 for operating both wet quench towers without baffle
12 systems. It reads in pertinent part" --

13 Q. And now I apologize again for interrupting you,
14 but the quotations in the emails are quotations
15 from the NOV that EPA had issued earlier that
16 month, is that correct?

17 A. That is correct.

18 Q. Please go ahead.

19 A. "From the findings of fact set forth above, EPA
20 finds that respondent operates the wet quench
21 towers of its coke oven battery without baffle
22 systems designed to effectively reduce particulate
23 emissions during quenching in violation of Section
24 214.5(a) of Part 214. So, the AO -- the AO that we
25 are preparing" --

1 Q. The AO, is that a reference to this potential
2 administrative order?

3 A. That is correct.

4 Q. Okay. Please go ahead.

5 A. "The AO that we are preparing will require
6 Tonawanda Coke to install and maintain baffles in
7 the west quench tower, and will require them to
8 maintain the already installed baffles in the east
9 quench tower in good working order. During the
10 upcoming meeting, not scheduled yet, with Tonawanda
11 Coke to discuss this NOV, it is possible that they
12 may bring up the issues of the state agreement not
13 to require baffles in the west quench tower."

14 Q. So, do I understand correctly, Mr. Eng, that at
15 the time you wrote this email, you had been advised
16 by Mr. Sitzman that an exemption had been granted
17 by the state of New York for -- telling Tonawanda
18 Coke that there is not a need to have baffles in
19 quench tower number 1 as long as it is used for
20 backup service less than 10 percent of the time?

21 A. Yes.

22 Q. You were aware that somehow the state of New
23 York had just forgotten about or had missed that
24 exemption when it drafted the facility's Title V
25 permit, correct?

1 A. That's what he told me, yes.

2 Q. And you were further aware as of December 30th,
3 2009, that even though the state had missed it, it
4 appears that Tonawanda never caught -- Tonawanda
5 Coke never caught this mistake that was made by
6 DEC, correct?

7 A. Yes.

8 Q. And you had no information at this time, if I
9 understand you correctly, that there had been
10 anything improper done by Tonawanda Coke, no
11 information about the percentage of use with regard
12 to this -- the quench tower number 1 in -- in
13 excess of 10 percent, correct?

14 A. That is correct.

15 Q. And yet you didn't do anything to correct this
16 NOV that your agency had issued requiring that
17 baffles be installed in quench tower number 1, is
18 that correct?

19 A. That's correct. But I would like to explain.

20 Q. Of course.

21 A. Okay. Usually we will issue an NOV, and that
22 NOV puts on notice to the company that we're
23 asserting that there's a violation of a particular
24 provision. The company has an opportunity to meet
25 with us and tell us why they don't believe they are

1 out of compliance with respect to a certain
2 requirement. And we will listen.

3 And depending upon the information they provide
4 to us, we can then at that point decide whether to
5 pursue additional enforcement action or essentially
6 to let it go. So, we don't go back and make
7 corrections to the NOV. It's just whether we
8 proceed further with an elevated enforcement
9 action.

10 Q. But in this situation, even though you hadn't
11 yet had feedback from Tonawanda Coke, you've
12 testified that Mr. Sitzman in effect advised you
13 that there was a mistake, both in the Title V
14 permit, and, therefore, in your notice of violation
15 upon which -- which relied -- I'm sorry, which
16 relied on the Title V permit itself. He's already
17 told you this, correct?

18 A. Correct.

19 Q. And yet you still did nothing to correct that
20 notice of violation and were still making plans to
21 proceed with an administrative compliance order,
22 correct?

23 A. At that point no information was offered that
24 would give us consideration to change that. We
25 received nothing other than Mr. Sitzman telling us.

1 We never saw the exemption. We never saw
2 documentation that supported the exemption.

3 Q. Did you doubt his word, sir?

4 A. No, but we normally will check to make sure
5 that all the information is in black and white.

6 Q. And yet you testified a moment ago that you
7 didn't follow-up with Mr. Sitzman to get a copy of
8 this letter he said he would send you.

9 A. That's correct.

10 Q. This is a state official telling you that they
11 had granted an exemption for this facility for
12 these baffles, and yet your testimony here is you
13 did not feel that imposed any obligation on you or
14 EPA to modify this compliance order that you had
15 issued, is that your testimony?

16 MR. MANGO: Your Honor --

17 MR. LINSIN: I'm sorry, modify the notice
18 of violation that had been issued.

19 MR. MANGO: Your Honor, objection at this
20 point. This is a December 30th email. The
21 indictment in the case, your Honor, proceeds only
22 up -- if I could just have one moment, your Honor.

23 Talking about quench tower number 1 here, your
24 Honor, which would relate -- which would relate to
25 Count 5 of the indictment, which goes up to

1 December 31st of 2009. So we're right now talking
2 about an email chain one day before the last day
3 charged in the indictment regarding this tower. At
4 some point this is irrelevant, your Honor. And
5 we've talked about this now. And I don't know how
6 long we're going to talk about this, and it stays
7 relevant.

8 THE COURT: Well, it's relevant on its
9 face by virtue of the date of this particular
10 email. I'll permit it.

11 MR. LINSIN: Thank you, your Honor. I
12 would just point out that these issues, at least in
13 Tonawanda Coke's mind, go not to Count 5, which is
14 one of the counts relating to the PRV, but go to
15 Counts 6 through 10 of this indictment, five
16 separate counts.

17 MR. MANGO: I misspoke, your Honor. I
18 meant to say Count 10 instead of Count 5. You've
19 ruled.

20 BY MR. LINSIN:

21 Q. So just getting back to your state of mind on
22 December 30th, 2009, even though Mr. Sitzman, who
23 was -- what was his position at the time you had
24 this conversation?

25 A. I believe he was the regional air pollution

1 control engineer.

2 Q. For Region 9?

3 A. For Region 9.

4 Q. Of DEC, correct?

5 A. Of DEC.

6 Q. And even though he had made this representation
7 to you regarding this exemption that his agency had
8 issued, you felt no requirement to modify your NOV
9 or to put the brakes on the plans for an
10 administrative compliance order, is that your
11 testimony?

12 A. We received nothing from Larry Sitzman that
13 would support that exemption. We never saw
14 anything from him, and we wouldn't change it unless
15 we did see something.

16 Q. And you didn't request anything further from
17 him?

18 A. We were waiting for whatever information he was
19 going to send.

20 Q. My question, sir, is you didn't request
21 anything further from him?

22 A. Yes, I did not request.

23 MR. LINSIN: I have nothing further, your
24 Honor. Thank you.

25 THE COURT: Okay. Thank you, Mr. Linsin.

1 Mr. Personius, anything?

2 MR. PERSONIUS: No questions, Judge.

3 Thank you.

4 THE COURT: Do you have cross?

5 MR. MANGO: I do, your Honor.

6 THE COURT: Okay. Let's take 15 minutes,
7 ladies and gentlemen. We'll resume again at ten
8 after four.

9 (Jury excused from the courtroom.)

10 THE COURT: Okay. Mr. Eng, you can step
11 down right now. Thank you. Thank you. We'll
12 resume again at 4:10.

13 MR. LINSIN: Thank you.

14 (Short recess was taken.)

15 (Jury not present in the courtroom.)

16 THE COURT: Do we have a preliminary
17 matter?

18 MR. LINSIN: It's really a very brief
19 scheduling question, your Honor. We expect, based
20 on conversation with government counsel, that the
21 cross of this witness and -- the conclusion of this
22 witness will take another 15, 20 minutes or
23 thereabouts. We have essentially two more
24 witnesses we will be calling, your Honor, Marcia
25 Williams and then Michael Ianello, who will be a

1 very, very brief witness.

2 Our request of the Court would be that we be
3 permitted to start -- Miss Williams will be a
4 somewhat lengthy witness. Start tomorrow morning
5 with Miss Williams rather than trying to do a piece
6 of her yet tonight and then start up again with her
7 in the morning. That's the only reason --

8 THE COURT: Do you anticipate we'll finish
9 both tomorrow?

10 MR. LINSIN: I fully do. Yes.

11 THE COURT: Okay. Yeah, I don't think
12 there's any problem with that.

13 MR. LINSIN: Fine. Thank you.

14 THE COURT: And then we can talk about
15 what's going to happen next week.

16 MR. LINSIN: All right.

17 THE COURT: Okay. Chris, if you would,
18 please.

19 (Jury seated.)

20 THE COURT: Take a deep breath, exhale,
21 get ready. Okay. Please have a seat. Good to
22 have you back. All right. Our jury is back, roll
23 call waived.

24 Mr. Eng, you're under oath, and the jury knows
25 that. You are now open technically to what we call

1 cross-examination.

2 So, all the attorneys and parties are back
3 present. I think Mr. Mango is going to ask you
4 some questions. And then we'll go from there.

5 Mr. Mango.

6 MR. MANGO: Thank you, your Honor.

7 THE COURT: You're welcome.

8 CROSS-EXAMINATION BY MR. MANGO:

9 BY MR. MANGO:

10 Q. Good afternoon, Mr. Eng. How are you?

11 A. Good afternoon. I'm fine.

12 Q. Mr. Eng, you mentioned you have 41 years in the
13 EPA, is that correct?

14 A. Yes, that is correct.

15 Q. And at the time you started with EPA, is it
16 fair to say that you initially worked in the air
17 program?

18 A. That is correct.

19 Q. And then after that you were in the Air
20 Facility Branch doing inspections for a time being?

21 A. Yes, that is correct.

22 Q. And then at some point you moved into the
23 Permits Branch?

24 A. That is correct.

25 Q. And then from there you went into the RCRA

1 Branch for about one year, is that correct?

2 A. That is correct.

3 Q. And then in 1988, you became Air Compliance
4 Branch chief, is that right?

5 A. That's correct.

6 Q. And you've served in that role since your
7 presence here today?

8 A. That is correct.

9 Q. Okay. And during your time doing inspections,
10 in your 41 years, had you ever in the past had an
11 opportunity to come to Buffalo?

12 A. Yes. That was my region. Region 9 with the
13 Buffalo region is where I got started doing my
14 inspections.

15 Q. Okay. You've done inspections at a site known
16 as Bethlehem Steel, is that right?

17 A. I did, indeed.

18 Q. And Donna-Hanna Coke?

19 A. Yes.

20 Q. Do you have any fond memories of a blizzard --

21 MR. LINSIN: Objection, your Honor.

22 Relevance and beyond the scope.

23 MR. MANGO: Your Honor, this is
24 introductory. I'm moving on. I'm not going into
25 those.

1 THE COURT: How about moving on then.

2 MR. MANGO: Mr. Eng, do you have any fond
3 memories --

4 THE COURT: No, without any fond memories.
5 We don't need any fond memories. Is that relevant?

6 MR. MANGO: No, your Honor.

7 THE COURT: Let's move on, please.

8 MR. MANGO: He was involved in the
9 Blizzard of '77. I was just going to make a
10 little -- make the jury aware of that, but we can
11 move on.

12 THE COURT: All right. Go ahead. I want
13 to hear about the Blizzard of '77.

14 BY MR. MANGO:

15 Q. All right. I'll try again with that. Do you
16 have any fond memories of the Blizzard of '77?

17 A. Yes, memories that I'd like to forget. Yes. I
18 was caught in the blizzard. I was conducting an
19 inspection of Bethlehem Steel in Lackawanna. And
20 all of a sudden there is an squall, and next thing
21 I know, I couldn't see my fingers in front of me.
22 And we said maybe we ought to get to the hotel.
23 Got into our car, started driving to the hotel
24 which was in downtown Buffalo.

25 Well, needless to say it was probably six hours

1 later we couldn't get there. We got stuck at the
2 auditorium. We made it to the auditorium where the
3 Buffalo Braves play. And we literally were on all
4 fours when we got out of the car and had to crawl
5 into the stadium and spend the night there with a
6 million other people.

7 So, like I said, it's a memory I'd like to
8 forget.

9 THE COURT: You didn't have time to
10 practice your jump shot, right? Well, it was worth
11 hearing.

12 MR. MANGO: I thought so, your Honor.
13 That's why I wanted to --

14 MR. LINSIN: Your Honor, I would withdraw
15 my objection.

16 THE COURT: All right. I mean, quite
17 frankly, that blizzard of '77 made Buffalo famous,
18 and people just don't forget snow in Buffalo ever
19 since then, so --

20 MR. MANGO: And how many people it
21 affected other than Buffalobians as well?

22 THE WITNESS: And lived through it.

23 THE COURT: Very true. Well, good.

24 Finally you did something right, Mr. Mango.

25 BY MR. MANGO:

1 Q. Mr. Eng, your office is located in New York
2 City, is that correct?

3 A. That is correct.

4 Q. All right. And you've flown here to Buffalo
5 because the defense wanted to call you as a
6 witness?

7 A. That is correct.

8 Q. All right. Let's talk a little bit about -- is
9 it fair to say that in your duties as branch chief
10 you coordinate with the DEC, the New York State DEC
11 on certain activities?

12 A. Yes, that is correct.

13 Q. Okay. Does that coordination include
14 coordinating on enforcement actions?

15 A. No.

16 Q. In fact, is it the general practice of EPA and
17 DEC to separately engage in enforcement actions,
18 isn't that right?

19 A. That is correct.

20 Q. And is it -- is it possible that DEC could
21 issue a notice of violation that EPA would not be
22 aware of at the time?

23 A. Yes, it's possible. And often it does happen.

24 THE COURT: Wait. Did you -- that DEC
25 would issue without EPA knowing about it, is that

1 the question?

2 MR. MANGO: That's the question, your
3 Honor.

4 BY MR. MANGO:

5 Q. And your answer is it is possible, and it's
6 most of the times?

7 A. Yes. It occurs.

8 Q. All right. Would DEC ever send a copy of a
9 notice of violation that they issued to the EPA?

10 A. They do, but not as soon as they issue.
11 It's -- usually they'll save all the enforcement
12 action and send it to us in one cluster.

13 Q. How often in a year?

14 A. Usually monthly -- I mean, usually quarterly,
15 every three months.

16 Q. Usually quarterly. Say, if a notice of
17 violation is issued in October -- you were asked
18 about one relating to baffles in the east quench
19 tower number 2 at the Tonawanda Coke Corporation
20 issued by DEC, is that right?

21 A. Yes.

22 Q. If that was issued in October, the last
23 quarter, when would it be typical to receive that?

24 A. Usually around January.

25 Q. Okay. Okay. Now, you were asked some

1 questions during your direct examination about the
2 EPA's issuance of a notice of violation dated
3 December 7th of 2009. You remember those
4 questions?

5 A. Yes, I do.

6 Q. And those related to a notice of violation for
7 the Tonawanda Coke Corporation failing to have
8 baffles in either quench tower, west or east?

9 A. Yes.

10 Q. All right. At the time -- and you were
11 involved in the process of issuing that notice of
12 violation, or at least aware of it?

13 A. Yes, I was aware of it, and I was involved.

14 Q. All right. And at the time EPA issued that
15 notice of violation, was EPA aware that DEC had
16 issued their October notice of violation for just
17 one of the quench towers?

18 A. No.

19 Q. All right. In fact, were you involved or aware
20 at all that EPA had issued -- your branch had
21 issued a Section 114 letter to Tonawanda Coke?

22 A. Yes.

23 Q. And would it fit with your recollection that
24 the EPA issued that letter on September 1st
25 of 2009?

1 A. Somewhere around that time, September.

2 Q. Okay. And are you aware that question 8 of
3 that Section 114 letter asked specifically for the
4 quench towers at the facility, "A, State whether
5 the quench towers have any baffles. If your answer
6 is no, explain why not."

7 A. Yes.

8 Q. That was one of the questions?

9 A. That was one of the questions in the 114
10 letter.

11 Q. And are you aware that in October the Tonawanda
12 Coke Corporation responded to that 114 request for
13 information?

14 A. Yes.

15 Q. And in that response when Tonawanda Coke came
16 to the question 8 about baffles, there's no mention
17 of a 1984 exemption for quench tower number 1, is
18 that correct?

19 A. That is correct.

20 Q. So these 114 letters, the letter that gets sent
21 by EPA and the response that comes in from the
22 Tonawanda Coke Corporation, did that factor into
23 you and your office's issuance of this notice of
24 violation?

25 A. Yes, it certainly did.

1 Q. When was your -- you mentioned on
2 cross-examination -- or direct, I'm sorry, that you
3 were not involved in the April joint EPA/DEC
4 inspection, is that right?

5 A. That is correct.

6 Q. And when -- after that time period, when was
7 your first inspection at the Tonawanda Coke
8 Corporation?

9 A. That was on January 26th and 27th of 2010.

10 Q. Okay. Mr. Eng, do you remember being showed
11 and admitted into evidence Government
12 Exhibit 3518.04, this email chain that happened on
13 December 30th?

14 A. Yes.

15 Q. All right. And in that email you reference a
16 conversation you had with Larry Sitzman, is that
17 right?

18 A. Yes.

19 Q. And do you know or do you remember if that
20 conversation happened on that day, December 30th?

21 A. I believe it happened on that day or very close
22 to that day. I usually write my memos as quickly
23 as I can, to be sure that I have the facts.

24 Q. And during that conversation did you learn that
25 there was some sort of exemption granted by the DEC

1 regarding this west quench tower?

2 A. Yes.

3 Q. And is it fair to say Mr. Sitzman told you it
4 was somewhere in the 1980s?

5 A. Yes.

6 Q. Okay. So going back from 2009, if it was 1984,
7 that would actually be 25 years ago, not 15, right?

8 A. Yes.

9 Q. All right. Is it accurate to say, Mr. Eng,
10 that you did not know about this exemption prior to
11 your conversation with Mr. Sitzman?

12 A. Yes.

13 Q. And the purpose of this email was to raise the
14 issue with the Region 2 management and let them
15 know that there had been a prior agreement
16 regarding quench tower number 1 between Tonawanda
17 Coke and New York State, is that right?

18 A. That is correct.

19 Q. And prior to your talk with Larry Sitzman, is
20 it fair to say the Air Compliance Branch, Region 2,
21 your department, was unaware of this exemption?

22 A. That is correct.

23 Q. But as you indicated in the email, you were
24 aware that Tonawanda Coke's Title V permit required
25 baffles for the west quench tower, isn't that

1 right?

2 A. That is correct.

3 Q. Okay. So, as head of the Air Compliance Branch
4 for Region 2, EPA, what is controlling to you, a
5 1984 exemption granted by the DEC or the Title V
6 permit?

7 A. The Title V permit.

8 Q. And in this email which I'm referencing,
9 Government Exhibit 3518.04, you mention, Mr. Eng,
10 in parentheses if I remember, "The state accidentally
11 left out this provision and TCC never caught it,"
12 is that right?

13 A. That is correct.

14 Q. Who told you that TCC never caught it?

15 A. Larry Sitzman told me.

16 Q. Is it possible that --

17 MR. LINSIN: Objection to possibilities,
18 your Honor.

19 THE COURT: It's kind of premature. Let's
20 me see what he's going to ask.

21 BY MR. MANGO:

22 Q. Mr. Eng, you're aware that the Title V permit
23 required baffles in both towers?

24 A. I'm aware of it, yes.

25 Q. Okay. Is it possible that when the Title V

1 permit was issued, Tonawanda Coke just assumed they
2 didn't get the exemption?

3 A. That is possible.

4 Q. Okay. And are you aware that in a renewal
5 application to the Title V permit sent in by the
6 Tonawanda Coke Corporation in 2006, there was no
7 mention of an exemption for quench tower number 1,
8 is that right?

9 A. Well, I didn't review the Title -- the renewal
10 Title V permit.

11 Q. All right. I'll withdraw if you haven't
12 reviewed that.

13 A. I don't remember.

14 THE COURT: Well, the question and answer
15 stay.

16 MR. MANGO: Yes.

17 THE COURT: It's part of the record.

18 BY MR. MANGO:

19 Q. I won't go any further on that then.

20 Mr. Eng, during your -- you were asked about
21 you trying to make determinations as to whether the
22 baffles met the requirements of Part 214 in this
23 email chain?

24 A. Correct.

25 Q. All right. On January 26th of 2010, did you

1 make a determination -- or first, did you see the
2 baffles?

3 A. I did, indeed. Yes.

4 Q. When you were there?

5 A. Yes, I saw the baffles.

6 Q. Okay. When you saw those baffles, were you
7 concerned at all?

8 A. I -- I saw a lot of daylight.

9 Q. Okay. And do you know -- is it fair to say
10 that in a documentation of that inspection, you
11 documented that you saw about 40 percent daylight?

12 A. Yes.

13 Q. And when you observed the 40 percent
14 daylight --

15 MR. LINSIN: Your Honor, I'm going to
16 object to this. This is going in a direction that
17 there's been a general agreement we're going to
18 stay away from throughout this trial. And now
19 moved beyond the time period that counsel objected
20 to when I was asking questions and into compliance
21 activities that occurred the next year.

22 MR. MANGO: I'll tighten up the scope,
23 your Honor.

24 THE COURT: Well, I think it is
25 problematic. So rethink where you want to go. And

1 I'll sustain the objection.

2 MR. MANGO: Yes.

3 BY MR. MANGO:

4 Q. Mr. Eng, are you aware of a federal regulation
5 Subpart 5(c) of the NESHAPs, which discusses the
6 amount of coverage necessary for baffles?

7 A. Yes.

8 Q. Okay. But for that --

9 MR. LINSIN: Your Honor, I am going to
10 object. This has nothing to do with the charges in
11 this case, and I object as irrelevant on that
12 basis.

13 MR. MANGO: Your Honor, this -- this
14 Subpart 5 --

15 THE COURT: Why don't we come up here and
16 we'll talk about it.

17 (Side bar discussion held on the record.)

18 THE COURT: You have to go here,
19 Mr. Mango.

20 MR. MANGO: Yes, your Honor. This 5(c)s
21 of the NESHAPs requires only 5 percent daylight be
22 allowed from the baffles. But the 5(c)s only
23 applies if the facility is a major for HAP,
24 hazardous air pollutant. So this puts into context
25 why the hazardous air pollutant emission inventory,

1 which we have heard testimony of from other
2 witnesses, why the Tonawanda Coke Corporation would
3 have an incentive to submit that to EPA, to show
4 that they are not a major for HAP. I'm not going
5 to go too far with this.

6 THE COURT: Well, I think it's -- I mean,
7 it's almost a collateral matter. It's confusing.
8 You tell me what your position is. Maybe -- maybe
9 you don't object.

10 MR. LINSIN: No, I do object, your Honor.
11 And honestly I think it is opening doors that I
12 thought all parties and the Court were trying to
13 keep closed here. This certainly is not charged in
14 this indictment. It was not -- I would object to
15 this line of questioning. I don't think it has any
16 relevance in the charges in the case.

17 THE COURT: I mean, you have inference on
18 inference. I think it's problematic. On that
19 basis I'm going to exclude it. I'll sustain the
20 objection.

21 MR. MANGO: Okay.

22 MR. LINSIN: Thank you.

23 (End of side bar discussion.)

24 BY MR. MANGO:

25 Q. Mr. Eng, is it fair to say that your

1 December 30th, 2009, email was an internal email
2 with your management just to give them a heads up
3 of what you had learned on that day?

4 A. That is correct.

5 MR. MANGO: Your Honor, if I can have one
6 moment.

7 THE COURT: Certainly.

8 MR. MANGO: Nothing further, your Honor.
9 Thank you.

10 THE COURT: All right, Mr. Mango, thank
11 you.

12 MR. LINSIN: I have no further questions,
13 your Honor.

14 THE COURT: Okay, Mr. Linsin, thank you.
15 Mr. Personius?

16 MR. PERSONIUS: Thank you, no, your Honor.

17 THE COURT: Mr. Eng, I don't know how you
18 did it. They don't have any further questions, so
19 we're going to let you go for the afternoon. Thank
20 you very much.

21 THE WITNESS: Thank you.

22 THE COURT: Okay. You may leave. Thank
23 you.

24 All right. I think, ladies and gentlemen,
25 given the hour, probably the efficiency of our

1 proceedings would be enhanced if we throw you out
2 of here now and have you come back here tomorrow
3 morning. Does that work for everybody? Okay. And
4 we will resume with the defense case.

5 Please don't lose sight of where we're at.
6 This case is important to both sides. Please don't
7 do anything to prejudge the case. Don't discuss
8 it. Don't research it. Just keep your minds open,
9 because you aren't that far away from getting to
10 the point where you'll be in deliberations, and
11 you'll be asked to resolve the fact issues
12 unanimously, to return the indictment
13 unanimously -- the verdict in this case based on
14 the indictment.

15 So, you know, we've gone a long way. Please
16 keep engaged. You've been terrific. We really
17 appreciate it. We'll see you tomorrow at the
18 normal hour which is 9:30. Okay. Be safe on the
19 way home. See you back here tomorrow morning.

20 (Jury excused from the courtroom.)

21 THE COURT: Thank you, Chris. Good night.

22 COURT SECURITY OFFICER: Good night.

23 THE COURT: Okay. Anything additional?

24 MR. LINSIN: Your Honor, I just have a
25 question as to the Court's thoughts on a charge

1 conference. We do expect -- I'm terrible at these
2 estimates, but we do expect that our two witnesses
3 tomorrow will wrap up by -- I would imagine by
4 early afternoon. And I know the Court is not
5 sitting on Friday. I'm just trying to get a sense
6 as to if the Court has given any thought to timing
7 and what we should plan for and anticipate.

8 THE COURT: Well, I mean, does the
9 government contemplate a request for a rebuttal
10 case?

11 MR. MANGO: It's possible. I won't say
12 likely at this point, your Honor, but it's
13 possible, depending on how the testimony plays out
14 tomorrow. We'll obviously be able to give the
15 court information after the conclusion of the
16 defense witnesses tomorrow, if they are concluded
17 tomorrow.

18 THE COURT: Okay. Thank you. Has anybody
19 done work on reviewing the charge?

20 MR. MANGO: Yes, your Honor. I've
21 reviewed it in its totality. I have -- as I put in
22 our response to the Rule 29 motion, the only
23 comment I would have is I think I would ask that
24 some definitions from the New York Codes Rules and
25 Regulations be included. And I could discuss that

1 at a later date if necessary.

2 THE COURT: Okay. I'm just trying to get
3 an idea of how much time --

4 MR. LINSIN: I can represent -- we could
5 certainly use -- I could use some time to review
6 the charge more thoroughly. I have reviewed it,
7 but I cannot say in-depth. We do have some
8 concerns about some of the instructions. If it is
9 the Court's intention -- that's part of why I was
10 asking if we were going to -- if the Court intended
11 to pursue this tomorrow, obviously we would have
12 our work cut out for us tonight. But if we're
13 looking at the possibility of a rebuttal case,
14 maybe it's a moot point for --

15 THE COURT: Well, let's do it this way.
16 Let's say that -- I mean, whichever way the
17 rebuttal case goes, if it -- I mean, if there is no
18 rebuttal case, maybe we can spend a little bit of
19 time on Friday.

20 MR. LINSIN: I understood the Court was
21 going to be --

22 THE COURT: I mean, I've got a little bit
23 of time before I have to be there, but -- does that
24 work?

25 (Discussion off the record between the

1 Court and courtroom deputy.)

2 THE COURT: You can meet with counsel?

3 THE LAW CLERK: I don't know if counsel is
4 going to be here Friday.

5 MR. LINSIN: Oh, yes. We intend to still
6 be in town for sure, and would be happy to make
7 ourselves available at whatever time would be
8 convenient.

9 THE COURT: Okay. What I might do, and
10 I'm still working this out with Mr. Moeller. We
11 might have him do some preliminary charge work with
12 all of you, and I think that might work. It would
13 give us a little bit -- give me a jump start in
14 terms of what we would have to do yet to get it
15 fine tuned to your respective satisfactions or not,
16 depending. All right. So nothing before Friday,
17 let's do it that way, regardless -- irrespective of
18 what you do.

19 MR. MANGO: Okay.

20 THE COURT: Okay. Thank you.

21 MR. LINSIN: Thank you, your Honor.

22 THE COURT: See you tomorrow. We'll try
23 to get started as close to 9:30 as we can.

24 MR. MANGO: Yes, your Honor.

25 * * * * *

CERTIFICATION

I certify that the foregoing is a
Correct transcription of the proceedings
Recorded by me in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.